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Concept Paper on Legal Structure

Khyber Pakhtunkhwa Board of Investment and Trade

August, 2014

This publication was produced for review by the USAID. It was prepared by KPMG Taseer Hadi & Co. for an assignment commissioned by Chemonics International under the USAID Firms Project.



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Data Page

Contract Number:	GBTI II Task Order No. EEM-4-07-07-00008-00
Contractor Name:	Chemonics International, Inc.
Name of the Component:	Value Chain Development (VCD)
USAID Technical Office:	Office of the Economic Growth and Agriculture; USAID Pakistan
Date of Report:	August 12, 2014
Document Title:	Concept Paper on Legal Structure - Khyber Pakhtunkhwa Board of Investment and Trade
Author's Name:	KPMG Taseer Hadi &Co
Editing:	Saleem, M. ; Zehra, M.
SOW Title and Work Plan & Action ID:	Development of Bye Laws/ Rules and Regulations/ Standard Operating Procedures for KP-BOIT, Work Plan Level: 22190, Action ID number: 7349
Project Area:	Khyber Pakhtunkhwa, Pakistan
Key Words:	Concept Paper, Government, Investment, KPBOIT, Legal Structure , Pakistan

Abstract:

The aim of this paper is to contemplate the legal structure of Khyber Pakhtunkhwa, while examining the domestic contemporary legal frameworks and reviewing the other similar strategies from developed regions.

Acronyms

BBOI	Board of Investment Bangladesh
BOISL	Board of Investment of Sri Lanka
CEO	Chief Executive Officer
CO	Companies Ordinance
CRO	Company Registration Office
DFIAC	Department of Foreign Investment Administration, China
FATA	Federally Administrated Tribal Areas
FIFA	FATA Investment Facilitation Authority
FIIA	Foreign Investment Implementation Authority
FIPB	Foreign Investment Promotion Board India
IBN	Investment Board Nepal
IPA	Investment Promotion Act
ISPAT	Republic of Turkey Prime Ministry Investment Support and Promotion Agency
KP	Khyber Pakhtunkhwa
KPBOIT	Khyber Pakhtunkhwa Board of Investment and Trade
KPMGTH	KPMG Taseer Hadi & Co.
MIDA	Malaysian Investment Development Authority
MOFCOM	Ministry of Commerce, Peoples Republic of China
Pak BOI	Pakistan Investment Board
PPP	Public-Private Partnership
SBI	Sindh Board of Investment
SDA	Sarhad Development Authority
SECP	Securities and Exchange Commission of Pakistan
SIDB	Small Industries Development Board
SOW	Scope of Work
USAID	United States Agency for International Development

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Expanded Executive Summary

This is the executive summary of the Preliminary Concept Paper submitted to the Khyber Pakhtunkhwa Board of Investment and Trade (“KPBOIT”). Taking into account the key concerns shared; the Concept Paper contemplates proposed legal structure of the KPBOIT while examining the domestic contemporary legal frameworks as well as reviewing selected frameworks from developed and more so from developing regimes. In view of the needs and requirements of the KPBOIT, an overview of the Concept Paper is as follows:

1.1 Introduction to KPBOIT:

The constitutional framework of Pakistan and under the constitutional framework, jurisdiction of KP Government to set up an investment board are briefly discussed. After the 18th Amendment to the Constitution of Pakistan (the “Constitution”) in 2010, the Provinces, by virtue of Article 167(4) of the Constitution, have been empowered to “raise domestic or international loan, or give guarantees on the security of the Provincial Consolidated Fund”. This empowers to the provinces to facilitate investments by guaranteeing the loans.

Prior to KPBOIT, investment facilitation organizations were functioning in KP Province in various forms over the period of time, but with a limited scope. Such organizations include Sarhad Development Authority (“SDA”); Small Industries Development Board (“SIDB”); Investment Facilitation Cell; and Investment Facilitation Committee.

From existing structure of KPBOIT, which is set up under an executive notification, it was noted that the organizational structure is not in place. Certain overlaps in regard to functions of KPBOIT with other organizations like SDA and SIDB are noted.

KPBOIT is functioning under the authority of notifications issued from time to time. It was noted that any notification can be conveniently superseded by another notification, which gives it a weak footing.

1.2 Methodology:

For the purpose of legal structure and mandate:

- The existing board of investment models in the country such as Pakistan Board of Investment, Punjab Board of Investment, Sindh Board of Investment, FATA Investment Facilitation Authority and Baluchistan Board of Investment were reviewed.
- In addition, the existing organizations in KP which, under their mandate are facilitating investments, such as SDA and SIDB were also reviewed.
- Regional and global Board of Investment such as India, China, Bangladesh, Nepal, Sri Lanka, Malaysia, Thailand, Mauritius and Turkey were also reviewed.
- For the purposes of information, following steps were undertaken:
 - (i) Visited the official websites of the relevant organizations for information;
 - (ii) Reviewed the Constitution, and relevant laws governing the organizations (Provincial, Federal and global);
 - (iii) Reviewed the executive notifications issued by KP Government and provided to us; and
 - (iv) Minutes of meetings of KPBOIT were reviewed.

1.3 Findings:

Based on the review of the existing legal structure of KPBOIT, comparison with other organizations:

- the legal structure of KPBOIT, as it exists today, does not confer autonomy in letter or in spirit and does not correspond to the functions it envisages to perform and lacks legal force to implement investment promotion and facilitation;
- Other organizations in KP, such as SDA and SIDB, owing to their legal/statutory backing may not let KPBOIT assume a lead role;
- KPBOIT is not well equipped either legally or structurally as an organization to deal with the Federal entities;
- A strong legal structure is required providing KPBOIT autonomy and independence in respect of its functions, administration and finances in order to effectively implement the vision and discharge its functions;
- Upon review of domestic and other international bodies, creation of KPBOIT under a statute is the most practiced and workable option.

1.4 Options:

Various options available for structure of KPBOIT were analysed. These options are (i) setting up of a Provincial Department; (ii) Attached Department; (iii) Autonomous Body (Statutory); and (iv) a not-for-profit company.

In regard to Provincial Government Department option, it was noted that a Department cannot act independently. It has to act under the Rules of Business of Provincial Government, which require tedious and bureaucratic process of consultation among various other Departments. Secondly, no administrative and financial autonomy is available under this option.

An Attached Department, is a semi-independent department, however, it is not financially autonomous and does not carry a separate legal identification. Moreover, while dealing with agencies of superior character, an attached department seems less effective.

A not-for-profit company imparts an independent and distinct legal and financial status to an entity. However, it cannot be impressive for the entities superior in nature i.e. statutory bodies and bodies under the Provincial Government. Moreover, it would be difficult to carve out the functions already being performed by the existing KP entities (SDA and SIDB).

An autonomous body is generally set up under an Act of Parliament (a statutory body) and has a distinct legal person, having perpetuity, can hold and dispose of property in its own name and can sue and be sued in its own name, more effective, influential and independent organization, which can effectively, authoritatively and independently implement investment promotion and facilitation. It is independent in financials, administration, human resources and functions.

1.5 Recommended Option – An Autonomous (Statutory) Body

Upon comparison, the legal structure of KPBOIT is recommended to be an Autonomous (Statutory) Body. Formation of a statutory body is discussed and the legislative process for setting up of a statutory body has been described.

A statute essentially provides for setting up of a body of permanent nature and having rights of succession; containing qualification criteria of its top executives (that is, the Chairman and the board members); defining functions and powers; providing for budgets and accounts; human

resources; power to make rules and regulations; and an overriding nature. It also validates the existing structure and actions taken by the existing organization.

1.6 Addressing Key Concerns in the Recommended Option:

Broadly speaking, the proposed legislation would mainly provide for the following:

- (i) Legal status
- (ii) Composition of Board
- (iii) Functions and powers
- (iv) Funding
- (v) Delegation of powers
- (vi) Absorption of investment promotion role from all existing entities
- (vii) Rule making and Regulation making powers
- (viii) Recruitment and status of employees and legal protection
- (ix) Power to seek assistance from other agencies and signing of MOUs, agreements
- (x) Validation of acts

While the above highlight the salient features, in the Report, it is attempted to address the key concerns in proposing the Autonomous (Statutory) Body option, briefly as follows:

1.6.1 Autonomy

The scope of autonomy needs to be addressed in the legal framework, which should fundamentally make it an administratively and structurally autonomous giving it full authority in the hiring and firing of human resource and for the purposes of generation and use of funds for the running of its affairs. Legal autonomy will confer independent status, right to sue and be sued, right to borrow and enter into contracts in its own name, right to acquire, hold and enjoy movable and immovable property.

1.6.2 Funding

Administrative autonomy is impossible without having financial autonomy. While grants from the government should be retained, independent and continuous source of funding must be catered for and in this regard the popular way is to have seed money forming perpetual part of the fund and income generated from investment. The statute can provide for a provision of funding from sources other than the Provincial Government.

1.6.3 Fiduciary Responsibility

Currently, no mechanism is envisaged regarding entrusting the board with any power vis-à-vis its functioning or conduct of business. The board has no financial powers and the notifications are vague regarding the day-to-day operations and expenditure. In the absence of financial powers, there cannot be any delegation of such powers. Statute can provide a clearer and a stronger legal framework addressing all such aspects and providing the power to delegate such powers as deemed appropriate.

1.6.4 Audit

For the purposes of transparency and accountability, the preferred option for KPBOIT is through private audit firms rather than subjecting it to the oversight of Auditor General that may not have

appreciation of the dimensions of financial and operational independence of such a body. Since any drawings from Provincial accounts may be subject to the audit by the Auditor General, therefore, such audit needs to be restricted to the audit of balance sheet and account for exhibiting the correct view of the affairs of the body.

1.6.5 Overlapping

KPBOIT has to be the focal body in order to have the lead role with overriding powers to undertake the proposed functions of a board of investment. Existing investment facilitation bodies would be dissolved or their functions would be carved out to facilitate KPBOIT as a lead agency or that such functions remain solely with the KPBOIT.

1.6.6 Composition of Board, Hiring of Staff

The concern regarding hiring of staff can be addressed in a statute by way of making it administratively independent. KPBOIT must be fully empowered vis-à-vis hiring of staff, experts and consultants and conferring power to make regulations. Also, the law can provide for absorption of the existing employees as required for the purposes of KPBOIT within the discretion of KPBOIT and those not required may either continue with their parent departments or can be declared surplus until absorbed by any other department. KPBOIT may have to continue paying their current salaries until their due absorption.

The Chief Minister of the Province, as Chairman KPBOIT, should have active position (not on administrative level, but on policy level) in the mainstream of KPBOIT, with the Vice Chairman having status of a Minister of Province, as he would be the front-runner. The Chief Executive Officer of KPBOIT may have status of MP-I as generally given to the heads of regulatory or similar agencies with the powers entrusted for day-to-day running of affairs of KPBOIT including hiring and firing by the management committee under his chair. Appointment of the management committee can be upon recommendation of the CEO to the Board. In addition to the oversight of the management, the Board would have policy making and advisory role; and the CEO would also act as Secretary to the board, as in other similar domestic and international bodies.

1.6.7 Framing of Rules and Regulations

Subject to the statute being in place, the three most fundamental rules/regulations required are; (i) Rules for the Conduct Business of KPBOIT; (ii) the Service Regulations; and (iii) the Audit Regulations. The first will address the functioning and decision-making process, the second will address the terms of employment for service with KPBOIT, and the third will ensure transparency and accountability in the day to day running of affairs.

1.6.8 Validation of Current KPBOIT

An express provision can address the concern by providing an umbrella protection to anything done, actions taken, notifications issued, agreements made, project initiated, processes and communication issued, and powers conferred, assumed or exercised by KPBOIT or its officers before the commencement of the proposed statute, to be deemed to have been validly done

1. Introduction

1.1 Background

Chemonics International is implementing the USAID Pakistan Firms Project that works to develop a dynamic internationally competitive business sector to accelerate sales, increase exports, investment, job growth and produce higher value added products and services. Within the business enabling component, the project has initiated an assistance program for the Khyber Pakhtunkhwa Board of Investment and Trade (KPBOIT) to help it meet its mandate promoting investment and trade in the province. The KPBOIT was created with a mandate to advocate specific investment friendly reforms and advise the KP government regarding the provision of adequate infrastructure facilities for making the KP Province business environment more conducive to international investment. Recognizing the need for extensive technical assistance to KPBOIT to enable it to realize its envisioned potential and further the Board's mandate.

1.2 Purpose of this concept paper

This concept paper has been prepared in pursuance of scope of work stated in clause A.2.a. of the technical assistance agreement between KPMGTH and USAID Firms project. Key purpose of this concept paper is to document results of a comprehensive study on legal structure of KPBOIT, various options available in this regard and identifying legal structure that is best suitable to KPBOIT for implementing its objectives.

2. Introduction to KPBOIT

2.1 Introduction and History

Pakistan is a federal republic and is governed by the Constitution of the Islamic Republic of Pakistan, 1973 (the “**Constitution**”). Under the Constitution, the Federation consists of four Provinces¹. The Constitution distributes the functions of the Federation among Federal Government and the Provinces pursuant to the Legislative List², which is given as Schedule IV to the Constitution. Any function, which is not provided in the Federal Legislative List is exclusive domain of the respective Province. After the 18th Amendment to the Constitution in 2010, the Provinces, by virtue of Article 167(4) of the Constitution, have been empowered to “*raise domestic or international loan, or give guarantees on the security of the Provincial Consolidated Fund within such limits and subject to such conditions as may be specified by the National Economic Council*”. [emphasis added]

The effect of such empowerment is that the Provincial Governments may attract investments in their provinces more effectively by incentivising the investors through announcing concessions and issuing Provincial guarantees and against local or foreign loan for purposes of investments.

As stated by the KP Chief Minister who is also the Chairman KPBOIT, the present Government has attached priority and importance to the creation of an investment friendly environment in the Province. For this purpose and to attain a sustainable economic growth, eminent businessmen have been placed on the KPBOIT Board so that it can be strengthened. It was said that, “*Government functionaries have been advised to provide the Board with maximum support and co-operation.*”

According to the Vice Chairman of KPBOIT, the primary goal of the new Provincial Government is to promote an effective, progressive and corruption free environment – “*functioning towards our goal, we will be working towards facilitating the investors by providing them with the pre-project requirements and formalities (but not limited to land procurement, pre-feasibility, insurance, banking and legal help, thereby providing the investors one window operation... KP has been regarded as the route to regional and international commerce and we aspire to convert it to a hub of investment and trade*”.

The KP Government, therefore, in order to exploit the economic potentials of the areas, which have been assigned to it under the Constitution, invites entrepreneurs to invest in such areas. In this regard, the Government specifically assigns role to the departments or bodies to promote investment in that particular area³.

In the past, various small scale investment facilitation bodies were set up by the KP Governments. Sarhad Development Authority and Small Industrial Development Board were both set up in the year 1972 to attract investment in industries (large as well as small scale). Later, Investment Facilitation Board was set up in the year 1985; the NWFP Investment Committee was set up in the year 1991 and Investment Facilitation Council was set up in the year 2005⁴. These bodies, however, could not bring in

¹ Article 1 of the Constitution

² Article 70 of the Constitution

³ Schedule II to KP ROB –Functions assigned to Transport Department i.e. “Attract Private Investment in Transport Sector”

⁴ http://e.thenews.com.pk/newsmag/mag/detail_article.asp?magId=10&id=2269

investment to KP as such bodies were having limited scope and thus, were not effective in devising and implementing the investment policies.

Resultantly, it was required that a body be set up that could, apart from facilitating investors to invest in any sector Constitutionally within the domain of KP Government, also effectively possess the ability to implement the investment policies and incentives there under, hence, KPBOIT came into existence through Notification AEA(IND)3-58/2012BOIT 9946-73 dated 10 September 2012 and the Industries, Commerce and Technical Education Department was notified as the Administrative Department for the KPBOIT.

2.2 KPBOIT –Background

KPBOIT has been set up by way of executive Notification AEA (IND) 3-58/2012BOIT 9946-73 dated 10 September 2012. Under this notification, KPBOIT consisted of the following:

- (i) Chief Minister KP designated as Patron in Chief/Chairman;
- (ii) Vice Chairman/Member of the Board (a representative from the private sector);
- (iii) Additional Chief Secretary Planning & Development Department;
- (iv) Secretary Finance Department;
- (v) Secretary Industries Department;
- (vi) four regional representatives in terms of the regions specified in Schedule I to the notification i.e., (i) Peshawar region including Mardan and Kohat (ii) D.I. Khan region including Bannu division (iii) Malakand division (iv) Hazara division including Hattar;
- (vii) four representatives (one each from the sectoral clusters specified in Schedule II to the notification i.e., Cluster No. I (i) agriculture, (ii), horticulture, (iii) livestock, (iv) poultry and honey-bee farming; Cluster No. II – (i) mines and minerals (quarrying), and (ii) mineral development/value addition; Cluster No. III – energy and power; and Cluster No. IV – (i) construction, (ii) tourism & hotels, (iii) transportation & communication, (iv) education, and (v) health services);
- (viii) two representatives from FATA;
- (ix) Members co-opted by the Board on need basis; and
- (x) Chief Executive Officer of the Board as Member/Secretary.

Thus, in total, the Board comprised of 16 representatives with the provision to co-opt other Members 'on need basis'. Only one Member i.e. the Vice Chairman was specified from private sector. The representatives from the regions and sectoral clusters did not specify as to whether the representatives would be from government or the private sector.

As per the Minutes dated 15 January 2013 of inaugural meeting of KPBOIT, it was decided that the Secretary, Industries, Commerce and Technical Education Department, KP would act as Chief Executive Officer of the Board till selection of the permanent Chief Executive Officer. Also, it was decided that KPBOIT would be registered as a company with the Securities and Exchange Commission of Pakistan and the services of an Accountant, Consultant and other supporting staff for the interim period would be hired on a need basis.

Subsequently, Notification AEA(IND)3-58/2012BOIT/14993 dated 2 September 2013 was issued by the KP Government, Industries, Commerce and Technical Education

Department which superseded the earlier Notification AEA(IND)3-58/2012BOIT 9946-73 dated 10 September 2012 (to the extent of composition of the Board). Variation was brought in the composition of the Board, substituting the 8 regional and sectoral clusters representatives with 14 representatives from diversified sectors and from various regions of the province. Additionally, six ex-officio Members from entities such as Small and Medium Enterprise Development Authority, Bank of Khyber, FIDO, Peshawar Electric Supply Company and Sui Northern Gas Pipelines Limited were given representation on the Board. However, representation from FATA was removed. In total, the Board envisaged 26 Members along with Members co-opted by Board on need basis. It is to be noted that ten functions earlier notified were further expanded and modified in the subject notification and are discussed later in this concept paper.

Consequent upon reconstitution of KPBOIT, the KP Government, Industries, Commerce and Technical Education Department vide Notification AEA(IND)3-58/2012BOIT/14994 dated 2 September 2013 was pleased to name and appoint Members on the Board for the period of three years with immediate effect. According to the aforesaid notification, Mr. Pervez Khattak being the Chief Minister is the Patron in Chief, Mr. Mohsin Aziz is the Vice Chairman/Member and in addition, 22 other Members named in the said notification. The Chief Executive Officer, Members to be co-opted on need basis and senior Member from sectoral committee were not named.

The KP Government, Industries, Commerce and Technical Education Department, vide Notification. AEA(IND)358/2012BOIT/17376 dated 31 October 2013, appointed Mir Javed Hashmat as the Chief Executive Officer/ Secretary of KPBOIT for a period of one year extendable for further period of two years, subject to satisfactory performance to be determined by the Board. The pay package and other emoluments were left to be decided by the Board.

As per the Minutes of KPBOIT meeting held on 4 November 2013, the Vice Chairman informed the Board that upon recommendations of the Selection Committee headed by the Vice Chairman, the Provincial Government notified appointment of Mir Javed Hashmat as the Chief Executive Officer /Secretary of the Board.

2.3 Existing Legal Status

As provided in paragraph 3.2 above, KPBOIT has been set up by way of executive Notification. Under the Notification, Investment Facilitation Council, Investment Facilitation Committee, and Industrial Facilitation Committee have been de-notified. The current structure of KPBOIT cannot be termed as corporate as it is not recognised as a separate legal entity. Thus, it does not possess the right to sue or to be sued in its own name, the right to borrow or invest or to act independent of its Members. There is no formal legal framework envisaged, in fact, even the essential powers for the management and running the affairs of the organization have not been conferred. Thus, the legal instrument i.e. the notification is on a very weak legal footing and is essentially vague in addressing what rights and obligations it possesses under law.

The KP Government for performance of its functions prescribed under the Constitution, made its Rules of Business in 1985 (“**KP ROB**”)⁵. Under the KP ROB, various departments are established as provided in Schedule I to the KP ROB. These departments are collectively referred to as the Secretariat in terms of S.2(r) of the KP ROB. A department is a *“self-contained administrative unit in the Secretariat responsible for the conduct of business of Government in a distinct and specified*

⁵ Article 139 of the Constitution

sphere, and declared as such by the Government". Accordingly, the Industries, Commerce, Mineral Development and Technical Education is a separate Department in terms of item 12 of Schedule I to the KP ROB and it being KPBOIT's Administrative Department, KPBOIT is to be perceived as a wing of a governmental department.

As per Paragraph 2 of the Notification dated 10 September 2012, KPBOIT shall have operational and financial autonomy. This notification was superseded by Notification dated 2 September 2013 to the extent of reconstitution of the Board whereby the composition was increased from 16 to 26 Members and co-opted members and functions of KPBOIT listed in earlier notification were elaborated. However, Paragraph 2 wherein the Industries, Commerce and Technical Education Department was specified as Administrative Department of KPBOIT and the operational and financial autonomy was expressly provided for, along with regions for representation in KPBOIT as per Schedule I and sectoral clusters (I to IV) as per Schedule II, still holds the field.

From the review and scrutiny of the relevant Notifications, Minutes of the Board meetings and the information on record, the following four aspects emerge.

- (i) **Temporary & ad hoc nature:** Apart from the fact that creation by notification does not lend permanence; the manner in which existing investment promotion related bodies i.e. Investment Facilitation Council, Investment Facilitation Committee, Industrial Facilitation Committee were de-notified by virtue of such notifications, similar action may de-notify KPBOIT. The notifications do not confer any power on the Board itself for the purposes of hiring. While the previous Notification dated 10 September 2012 empowered the Board to hire experts and consultants, the subsequent Notification dated 2 September 2013 only mentions outsourcing power to hire consultants. While the functions have been provided, there is no mechanism envisaged in this notification for the functioning of the Board or conduct of business of KPBOIT. However, the KP Government Industries, Commerce and Technical Education Department vide a separate Notification AEA(IND)358/2012BOIT/17376 dated 31 October 2013 has constituted **Executive Committee/Human Resource Committee** comprising of 6 Members including the Vice Chairman and the Chief Executive Officer for the performance of functions mentioned in TORs of the said committee, which are specified in the said notification and are reproduced below:

- (i) Make recruitments/appointments
- (ii) Determine terms and conditions of service of the Board employees
- (iii) Fix salaries and other emoluments
- (iv) Over-see implementation of the Board decision
- (v) Regulate working of the Board offices
- (vi) Monitor purchases and expenditure
- (vii) Perform any other function assigned by the Board from time to time.

Legally, the formal and proper procedure should have been that these powers should have been conferred and entrusted to the Board of KPBOIT and the Board should have been given the power to appoint committees and delegate the powers as deemed appropriate. As per the Minutes of the 4th meeting dated 2 April 2014, in order to ensure financial discipline, the Board decided to constitute the Finance Committee and Audit Committee but nothing to this effect has been mentioned in the referred notifications.

In relation to the Audit and Finance Committee, the funding and expenditure aspect becomes relevant which again finds no mention in the referred notifications. However, pursuant to KP Finance Department Notification BOVIII/FD/1-8/2013-2014 issued by Budget Officer, an amount of Rs.100 million was approved by the Chief Minister for the establishment of the KPBOIT, out of which Rs. 50 million was released during the financial year 2012-13 and the remaining Rs. 50 million was allocated in the current financial year as per release policy. 50% of the allocated fund was released vide Finance Department's letter dated 8 July 2013 and the balance 50% was released on 11 October 2013. In the KPBOIT Board meeting dated 2 April 2014, approval of the Board was sought for Rs. 14.280 million incurred up to 28 March 2014. This highlights the dependence of KPBOIT on the government funds, which may greatly impact on the envisaged "financial autonomy".

Such random exercise of power by the "competent authority" is neither in sync with the letter nor, the spirit of KPBOIT's objective. In particular, when read with Paragraph 2 of the Notification dated 10 September 2012 which expressly provides that the "Board shall have operational and financial autonomy". In the same paragraph, the Industries, Commerce and Technical Education Department has been named as the Administrative Department. This again calls for clarification as to what extent the Administrative Department will have a role in the operational and financial independence/autonomy of KPBOIT.

The ad hoc approach i.e. the tendency to establish temporary, chiefly improvisational policies and procedures to deal with specific problems and tasks cannot bear long lasting results.

- (ii) **Functions:** The functions to be performed by KPBOIT specified in Notification AEA(IND)3-58/2012BOIT/14993 dated 2 September 2013 are merely an elaboration with some modifications provided in the earlier Notification AEA(IND)3-58/2012BOIT 9946-73 dated 10 September 2012. These functions have been discussed in Section 3.4 below in **detail**, however, these primarily envision; one window facility, facilitation, public private partnership policy, conducting sectoral studies, creating awareness, formation of sectoral committees, productive interaction with business community, strengthening priority sectors, identification of projects, and liaison with the banking industry.

(iii) **Classification of regions and sectoral clusters:**

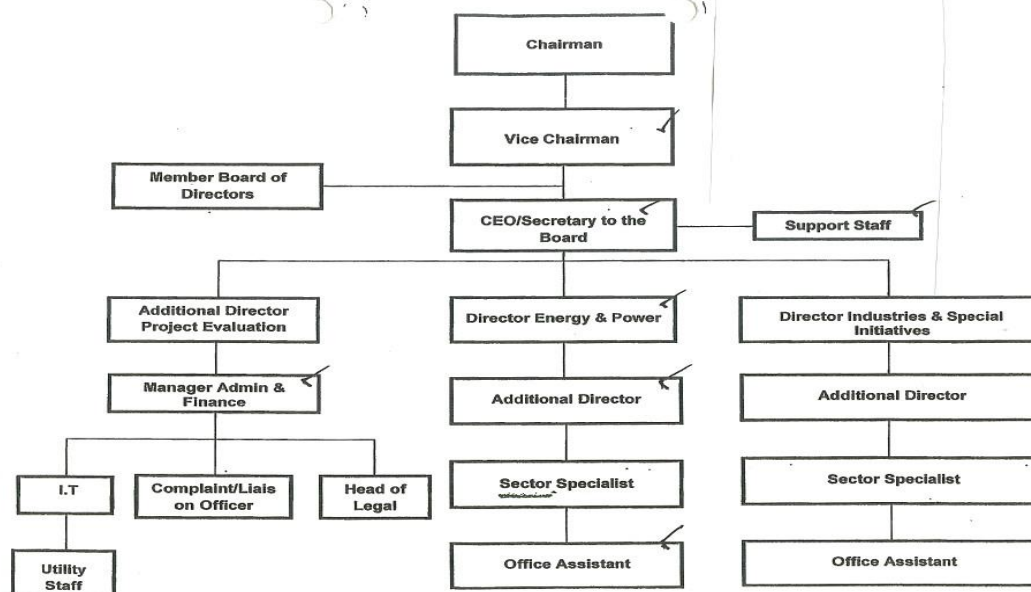
- Pursuant to the previous Notification dated 10 September 2012, Schedule I specified regions for representation in KPBOIT, which are: (i) Peshawar Region including Mardan and Kohat; (ii) D.I.Khan Region including Bannu Division; (iii) Malakand Division; and (iv) Hazara Division.
- In Schedule II, the scope of functions of KPBOIT is spread over 16 Sectors divided into 4 clusters; Cluster No. I comprises of (i) agriculture, (ii) horticulture, (iii) livestock, and (iv) poultry and honey-bee farming; Cluster No. II includes (i) mines and minerals (quarrying), (ii) mineral development/value addition; Cluster No. III comprises of (i) energy and power; and Cluster No. IV includes (i) construction, (ii) tourism & hotels, (iii) transportation & communication, (iv) education, and (v) health services. Accordingly, in the subsequent Notification dated 2 September 2013, from merely

8 regional and sectoral representatives on KPBOIT, the representation was increased to 14. This was to ensure due representation from diversified sectors of industry/trade from various regions of the province.

- (iv) **Vision:** The contents of the notifications while vague on many aspects still provide the underlying vision behind the establishment of KPBOIT. For instance, de-notification of other named investment promotion related bodies to enable KPBOIT, the new entity, to function as ‘lead agency’ certainly is reflective of the desire that the entity must have a controlling and an overriding role. In support of this, we find comments and deliberations in the Minutes of the 4th meeting of KPBOIT held on 2 April 2014 wherein one of the Members referring to the directive issued by the Chief Minister on 10 January 2014 stated that KPBOIT “*should be a supreme body to provide one window facility to the investors and duplication of function may be avoided as far as possible*”. In the same meeting, it was proposed that KPBOIT should be “*strengthened with sufficient manpower*” and “*taken as a focal point for investors*”. The Additional Chief Secretary, Planning & Development, endorsing strengthening of KPBOIT, assured that the KP Government would nominate a focal person from each Department to co-ordinate with KPBOIT for all matters relating to investor facilitation. Suggestion was also made by the Chief Executive Officer to give KPBOIT the status of a company to give it legitimacy and it was deliberated by the Additional Chief Secretary, Planning & Development that the vision at time of establishment of KPBOIT was to give it autonomy at a later stage. It was also observed that there was a need to “*provide more strength and teeth to KPBOIT so that decisions are implemented in shortest possible time*”. The objective is to flourish and revive the investment climate of KP and turn it into a lucrative investment friendly destination by providing one window operation and proactively engaging with all the stakeholders. In principle, KPBOIT is to act as a bridge between investors and all government departments and organizations for timely decision-making. The KPBOIT is intended to be an efficient tool in the ongoing efforts of the government towards triggering accelerated economic development specially to showcase the potential of opportunities to boost the available means and convert the current status of the economy into a healthy and vibrant one.

2.4 Organizational structure

The existing organizational structure of KPBOIT as per Minutes of inaugural meeting dated 15 January 2013 (it is understood that this was the first meeting pursuant to Notification dated 10 September 2012) is as under:



However, the employee details dated 20 May 2014 that has been provided to us only reveal list of fifteen (15) employees which include the Chief Executive Officer/Secretary, Director Energy & Power, Additional Director Energy & Power, Additional Director Project Evaluation & Special Initiative, Manager Project Evaluation, Manager Admin/Finance, IT Assistant, Office Assistant, Stenographer, Dispatcher, 2 Drivers, 2 Naib Qasids and a Sanitary Worker/Sweeper. KPBOIT does not seem to have any organizational structure owing to the dearth of human resource.

2.5 Objective, scope and mandate

Under both the notifications dated 10 September 2012 and 2 September 2013, the key objective that emerges has been expressly enunciated and that is to enable the new entity to function as 'lead agency' in the performance of the following functions:

- (i) **One window facility:** To provide one window operation facility to investors by proactively engaging and coordinating with all concerned departments of the Provincial Government. In order to ensure that one window operation is effective and successful, the board will engage and work as a bridge between the investor and all related Government and semi-Government departments.
- (ii) **Facilitation:** Advise the Government on creating an enabling environment for investment through advocacy of specific investment friendly policy reforms and provision of adequate infrastructure facilities for making the process attractive to investors.
- (iii) **Public Private Partnership policy:** To assist in developing a comprehensive Public Private Partnership policy for adoption by the Government and later on develop innovative models based on the policy in different potential sectors of the Provincial economy.

- (iv) **Sectoral studies:** To undertake sub-sectors studies, develop concepts, briefs and fact sheets internally and through outsourcing to consultants on different priority sectors of the Provincial economy, particularly small and medium enterprises, that has the potential for growth and employment generation and share the same with private and institutional investors including multilateral and bilateral donors.
- (v) **Identification of projects:** To identify sector wise potential projects and prepare pre-feasibility reports of such projects wherever possible.
- (vi) **Creating awareness:** Hold conferences, seminars, roundtables and structures presentation locally and internationally to attract potential investors by creating awareness about Provincial Government's policies, building confidence, exchanging practical and feasible investment ideas.
- (vii) **Liaison with banking industry:** Liaise proactively with the banking industry and State Bank of Pakistan to improve the deposit to loan ratio in the province and specifically encourage and assist the banks/institutions for small and medium enterprises and small scale agriculture financing
- (viii) **Productive interaction with business community:** To engage on a regular basis with the larger business community including but not limited to business association, forums, trade bodies and chambers of commerce and industry both in the province and nationally to stimulate ideas for investment in the province.
- (ix) **Strengthening priority sectors:** Attract and identify long term investment for larger projects in the areas of Industry, including hydel power house, gas/coal power houses, oil and gas exploration, mining, waste to energy projects textiles, hotels, tourism, theme and venture parks, education, health, wood based project, tobacco, automobile, electronics, services, synthetic fibers, fruit, vegetables, food etc. both local and foreign, including opening of trade bonds through issuance of local and Diaspora bonds, arranging venture capital subject to approval of (sovereign) guarantors and facilitate the creation of investment vehicles like special purpose vehicles etc.
- (x) **Sectoral committees:** Formulation of sectoral committees for different sectors on need basis, at gross root level for advice and assistance.

2.6 Legal Structure vis-à-vis Achievement of Objectives

KPBOIT is mandated to achieve investment promotion in the KP Province. Currently, it has identified 4 projects in Tourism and 1 project in each of Local Government, Transport and Energy and Power sectors⁶. In order for implementation of these projects, KPBOIT would require to liaison with various entities such as KP Government departments, potential investors and Federal Government entities (such as National Highway Authority, the Pak BOI etc.). Also, in order for attracting the investment from private sector, KPBOIT would need to highlight incentives to the investors and for winning the confidence of the investors, KPBOIT would firstly require a sound and credible legal as well organizational structure. This would help attracting qualified human resource (both employees and consultants as sectoral specialists) who can enhance KPBOIT's image, facilitate investors and supplement efficient interaction with other Government agencies, thus, truly creating an enabling environment; which KPBOIT presently lacks. The provision of one window facility (such as providing sector related information, assisting in obtaining regulatory approvals, facilitation in respect of

⁶ <http://www.kpboit.com.pk/index.php?option=ml&menu=sub&refs=21>

inflow of investments etc.) to the investors (Provincial as well as Federal level) would require an independent and authoritative interface between KPBOIT and other concerned departments.

These factors reflect that the objectives assigned to KPBOIT require an improved organizational structure as the ad hoc and temporary nature of the organization discussed above may be the biggest impediment in the achievement of its objectives and the discharge of its functions.

Besides a proper legal framework providing legitimacy and protection umbrella to the activities undertaken or to be undertaken is also mandatory for the smooth running of the affairs and effective functioning of the organization. Such legal framework is a condition precedent before the organization itself comes into action.

3. Our Approach and Methodology

The legal structure and models of the existing board of investment were reviewed in detail in light of the relevant Notifications, Minutes of the Board meetings and the information on record, in Section 3.3 titled “Existing Legal Status”.

Regarding the objectives, scope and mandate of KPBOIT, from the list of functions of KPBOIT specified in the Notifications dated 10 September 2012 and 2 September 2013 of Department of Industries, Commerce and Technical Education, Government of KP, it was observed that essentially, the KPBOIT has an advisory and facilitation role. Further to this objective, specific functions of the KPBOIT have been laid down which adequately address key aspects. However, in order to further expand the scope and mandate of the KPBOIT, seeking guidance from other local and global investment promotion bodies, further functions may be allocated to KPBOIT.

In this respect, it is suggested that similar to the Punjab Board of Investment and Trade, KPBOIT may include in its mandate, resolution of investment-related disputes in accordance with and subject to applicable laws. Also, the scope of KPBOIT may include liaison with and assistance of the Board of Investment, Government of Pakistan on behalf of the Government of KP in formulation and implementation of the investment policies of the Government of Pakistan.

Further, the scope of functions of the investment promotion agency of Turkey i.e. The Republic of Turkey Prime Ministry Investment Support and Promotion Agency, “site selection” has been specified as one of the functions of the agency. As per the information shared in our meetings with KPBOIT, it is understood that KBBOIT performs this function too, therefore, it is suggested that the same should clearly be specified in KPBOIT’s scope of functions.

Finally, it is pertinent to mention that the functions ascribed to the Board of Investment of Sri Lanka conclude with the power “*to do all such other acts as may be necessary or conducive to the attainment of any or all of the aforesaid objects*”. KPBOIT should have a similar clause in order to ensure that the scope of KPBOIT’s functions includes the power to carry out functions incidental to the key functions.

Regarding review of applicable information, please note that this Legal Structure Concept Paper is founded upon assumptions drawn on the basis of our discussions/meetings with the KPBOIT representatives at Peshawar on 20 May 2014 and 10 June 2014, and certain information shared with us on 21 May 2014 and 4 June 2013 in order to evaluate the existing structure. The information shared with us consisted of Government of KP Notifications dated 10 September 2012, 2 September 2013, 31 October 2013 and 11 April 2014 as well as Minutes of Board meetings dated 15 January 2013, 4 September 2013, 4 November 2013, and 2 April 2014 and the draft presentation on the Investment Guide of KPBOIT.

Besides, Board of Investment Ordinance, 2001; the North-West Frontier Province Sarhad Development Authority Act, 1972 and the North-West Frontier Province Small Industries Development Board Act, 1972 were also reviewed in order to evaluate the existing framework for the investment promotion bodies at different levels. Details of various aspects such as objectives, scope, legal structure etc. of the Pakistan Board of

Investment, Sarhad Development Authority and Small Industries Development Board in view of the relevant laws followed by comparison with the KPBOIT, are entailed in Section 5.1, Section 6.1 and Section 6.2 respectively.

We also visited official websites of Punjab Board of Investment and Trade, KPBOIT, Sindh Board of Investment, Board of Investment, Government of Pakistan and the official websites of the regional and global investment facilitation bodies as referred to in Section 7.

Additionally, unofficial copies of the Memorandum and Articles of Association of the Punjab Board of Investment and Trade were procured. In this course, existence of Board of Investment and Trade, Punjab, was known. It is a not-for-profit company set up in 1999 to undertake the similar functions as Punjab Board of Investment and Trade set up in 2009 is carrying out. However, to our understanding, the Board of Investment and Trade, Punjab set up in 1999, is a dormant company and for the purposes of promotion of investment and related matters, Punjab Board of Investment and Trade is the representative institution for the Punjab Province. Accordingly, our review of the legal structure of Punjab Board of Investment and Trade is subject to our aforesaid understandings.

Detailed discussion and review of the objectives, mandate, legal structure, key activities, of the Punjab Board of Investment and Trade and Sindh Board of Investment will follow in Section 5.2 and 5.3 of this Concept Paper, respectively.

Key concerns with the existing structure of KPBOIT in regard to its legal standing as an effective one window facilitator, its administrative ability to function as an autonomous body, its ability to manage its finance and accounts and its power to have own employment set up were noted. In order to meet with these concerns, the proposed structure for KPBOIT is to be a statutory body. This structure would sufficiently cover the key concerns as given in this Concept Paper.

4. Review of Existing Investment Facilitation Bodies in Pakistan

4.1 Pakistan Board of Investment

4.1.1 History and Background

The Pakistan Investment Board (“**Pak BOI**”), as it is so called today, was established in October 1990 as an executive department of the Government of Pakistan. It was renamed as Board of Investment and declared as part of the Prime Minister’s Secretariat with effect from 27 April 1994 and the Prime Minister became the President of the Board. Thereafter, the Board of Investment was declared as an attached department of the Ministry of Industries & Production in September 1996.

Pak BOI was set up in 2001 pursuant to the Board of Investment Ordinance, 2001 (the “**Ordinance**”) “*as an apex agency to promote, encourage and facilitate both local and foreign investment*”⁷. It is currently under the administrative control of the Prime Minister’s Office.

4.1.2 Objectives, Mandate and Scope

Pak BOI acts pursuant to the directives of the Federal Cabinet or its Committee on Investment. These functions primarily consist of wide range of services provided by Pak BOI and include providing information on the opportunities for investment and facilitating companies that are looking for joint venture. The Pak BOI acts as a focal point of contact for prospective investors, both domestic and foreign, to provide them with all necessary information and assistance in coordinating with other government departments/agencies. The functions of Pak BOI find their place in Section 9 of the Ordinance. It is responsible for its own finance, budget and accounts. It cannot be extinguished except by way of repeal of the existing Ordinance through an enactment of Parliament to this effect.

4.1.3 Legal Structure

Pak BOI is a statutory body and acts like a separate and an independent legal person. It can hold property in its own name and can sue and be sued in its own name and can enter into agreements in its own name. Its purposes are defined by the Ordinance. It can make its rules by prior approval of the Federal Government for the purposes of the Ordinance and to regulate appointments and conditions of service of officers and employees in the service of the BOI; and it can make regulations⁸.

4.1.4 High Level Organizational Structure

Section 3(d) of the Ordinance provides for the composition of the Pak BOI. According to the aforesaid Section 3(d), “*not less than seven and not more than*

⁷ Preamble to the Board of Investment Ordinance 2001

⁸ Sections 23 & 24 of the Ordinance

twenty-five ex officio members and non-official members, provided that not less than three non-official members shall be appointed from private sector from amongst persons of renowned integrity, expertise, experience and knowledge including, inter alia, academia, science, agriculture, banking, Business, commerce, economic, engineering, finance, industry, investment, law, marketing, mathematics, statistics and technology". Accordingly, Pak BOI consists of the Prime Minister as the President, the Federal Minister whose division is in-charge of Pak BOI, the Chairman of Pak BOI, and at least three members from the private sector. According to Federal Government's notification dated 25 March 2013, the board consists of the Prime Minister of Pakistan as the President. Other members from public sector are Ministers for Finance and Economic Affairs and Industries; Chairman BOI; Deputy Chairman Planning Commission; Chairman Federal Board of Revenue and Secretary BOI. The private sector members are 20 in number⁹.

Federal Government appoints the Chairman of the BOI who performs functions as may be assigned by the board¹⁰. Federal Government appoints the Secretary of Pak BOI and his status is equal to the Secretary (BS-22) of the Federal Government. The Secretary is the principal staff officer of the BOI and is also the principal accounting officer. He performs functions as assigned by the Chairman and is also obliged to attend meetings of the board¹¹. The management staff consists of 2 Executive Director Generals (BS-21), 4 Director Generals (BS-20) and 7 Directors (BS-19)¹².

4.1.5 Key Activities

Pak BOI assists companies and investors who intend to invest in Pakistan as well as facilitates the implementation and operation of their projects. The wide range of services provided by BOI includes providing information on the opportunities for investment and facilitating companies that are looking for joint venture. In addition, Pak BOI's activities include encouraging and facilitating the flow of Foreign Direct Investment in Pakistan through speedy and transparent processing of applications (providing one-window facility in obtaining visa, branch office approvals, foreigners' clearances etc.), Specialized Economic Zones, Act, Investment Policy and Strategy. In result of its activities, Pakistan has attracted over 15 billion US dollars in Foreign Direct Investment since 2008.

4.2 Punjab Board of Investment and Trade

4.2.1 History and Background

Board of Investment and Trade Punjab ("**Punjab BOIT**") was set up in 2009 as a company under the Companies Ordinance, 1984.

4.2.2 Objectives, Mandate and Scope

The mandate of Punjab BOIT is to focus "*around three key objectives: facilitating new and existing businesses; creating a mutually beneficial business environment through proactive policy advocacy both at the provincial and federal level and, promoting Punjab as the ultimate investment destination*"¹³.

⁹ <http://boi.gov.pk/AboutUs/CompositionofBOI.aspx>

¹⁰ Section 4 of the Ordinance

¹¹ Section 5 of the Ordinance

¹² <http://boi.gov.pk/AboutUs/Organogram.aspxx>

¹³ <http://www.pbit.gov.pk/eng/overviewww>

The object clause of the Memorandum of Association¹⁴ of Punjab BOIT lists down its objectives as follows:

1. To encourage and promote investment, both foreign and local, in the Province of Punjab, by identifying investment opportunities in all areas and sectors of the Provincial economy including but not limited to agriculture, dairy and livestock, business and industry, infrastructure and energy, health, education, technical education and vocational training, and research and development.
2. To encourage and induce commercially viable private sector participation in all sectors of the Provincial economy and in this regard to develop Public-Private Partnership (PPP) models, guidelines and proposals for the Government of the Punjab.
3. To provide guidance and advice to the Government of the Punjab on matters related to investment, foreign and local, in the Province of Punjab.
4. To review investment promotion plans, formulate institutional arrangements, make transparent and simplified procedures and guidelines for investment promotion in the Province of Punjab.
5. To appraise, evaluate and process all investment proposals and projects received from the investors for submission to the Government of the Punjab.
6. To appoint commissions, expert bodies and consultants to study various aspects of attracting investment in all sectors and improving the investment climate, procedures and other related matters.
7. To work with implementing agencies of federal, provincial and/or local governments and state-owned enterprises in refining and improving investment proposals.
8. To provide 'one-window' facilities in accordance with and subject to applicable laws, for the provision of all services and utilities to investors by federal, provincial or local governments and state-owned enterprises.
9. To endeavor to resolve investment-related disputes and other disputes regarding commercial activities of the Government of the Punjab, in accordance with and subject to applicable laws.
10. To liaise with private sector trade bodies and associations for their active participation in promotion of investment.
11. To liaise with and assist the Pak BOI on behalf of the Government of the Punjab in formulation and implementation of the investment policies of the Government of Pakistan.
12. To conceptualize, plan, develop and implement marketing, image-building and public relations strategy to generate interest in the investment potential and opportunities in the Province of Punjab, and to publicize its activities.

¹⁴The object clause is subject to our review of official copy of Memorandum of Association

13. To monitor the progress of investment programs and projects in Punjab at all stages and to ensure prompt implementation and operation.
14. To collect, compile, analyze, maintain and distribute investment-related information relevant to the Province of Punjab and from time to time, publish periodical analytical reports in investment trends.
15. To plan, organize, hold, convene, host and/or participate in conferences, seminars, road-shows, fairs, exhibitions and other similar activities to promote the investment potential and opportunities of the Province of the Punjab both within and outside Pakistan.

4.2.3 Legal Structure

Being a not-for-profit company, the Punjab BOIT consists of a board headed by a chairman and members from public as well as private sectors and an advisory council¹⁵. It is structured as an autonomous body under the Industries, Commerce and Investment Department of the Government of Punjab¹⁶. Being a company set up under Section 42 of the Companies Ordinance, 1984, it is a corporate body and acts as an independent legal person. It can be wound up voluntarily by its members (that is, the Government of Punjab) or through court.

4.2.4 High Level Organizational Structure

The members of the board consist of public sector members and private sector members. Public sector members include Chairman Planning and Development Department and Secretaries of Finance and Industries Commerce and Investment Departments of the Punjab Government. The Chief Executive Officer and Vice Chairman of the board are from private sector and total private sector members, including the Chief Executive Officer and Vice Chairman, are 5. The Advisory Council consists of 5 members. Being an incorporated company, the employment at Punjab BOIT solely rests with the Punjab BOIT¹⁷. At present, the high level management consists of 2 Director Generals, 2 Directors and 1 Additional Director.

The Articles of Association prescribe for a Board of Directors of not more than 18 members, excluding the Chief Executive Officer. There are 4 ex-officio directors and 8 directors from private sector on the board. In addition, the Articles of Association provide for one Chief Operating Officer, who is in-service Civil Servant in BS 20 in the Punjab Government and may be appointed on contract.

4.2.5 Key Activities

Key activities include conducting seminars and conferences in reference to investment opportunities in the Punjab Province; and providing consultancy services to Planning & Development and Energy Departments of the Punjab Government. Punjab BOIT is also providing consultancy services to the Higher Education Department of the Punjab Government.

¹⁵ <http://www.pbit.gop.pk/eng/our-board-members>

¹⁶ First Schedule to the Punjab Government Rules of Business, 2011

¹⁷ Memorandum and articles of the Punjab BOIT along with its employment policy manual are required

4.3 Sindh Board of Investment

4.3.1 History and Background

Sindh Board of Investment (“SBI”) was set up in or about year 2009 as an attached department under the Finance Department of Sindh Government.

4.3.2 Objective, Mandate and Scope

The scope of creation of the board is promotion of investment in all sectors of economy; facilitation of local and foreign investors for speedy materialization of their projects and to enhance Sindh’s international competitiveness and contribute to economic and social development¹⁸.

4.3.3 Legal Structure

Being attached department of the Sindh Government, SBI although an autonomous body, it does not enjoy the status of a legal person. It can be dissolved merely by an executive notification of the Sindh Government. It cannot act independently in its own name.

4.3.4 High Level Organizational Structure

SBI consists of 5 public sector members including its Chairman and Secretary who is also Director General of SBI; and 8 private sector members¹⁹. Since SBI is not a legal person and hence, functions of the board are not defined by a legal instrument, therefore, the terms of reference of the board are given in the notification which appoints the board. The high level management consists of 4 Directors and 1 Legal Advisor.

4.3.5 Key Activities

The key activities of SBI include creating mega economic assets, supporting agribusiness, promoting energy investments, investments in livestock and fisheries and conducting exhibitions, conferences and business delegations²⁰.

4.4 FATA Investment Facilitation Authority

4.4.1 History and Background

Under the Constitution, Federally Administered Tribal Areas (“FATA”) include the following territories²¹:

- I. Tribal Areas adjoining Peshawar district;
- II. Tribal Areas adjoining Kohat district;
- III. Tribal Areas adjoining Bannu district;
- IV. Tribal Areas adjoining Lakki Marwat district;
- V. Tribal Areas adjoining Dera Ismail Khan district;
- VI. Tribal Areas adjoining Tank District;
- VII. Bajaur Agency;

¹⁸ <http://www.sbi.gos.pk/introduction.php>

¹⁹ <http://www.sbi.gos.pk/pdf/SBI%20BOARD/Notification.pdf>

²⁰ <http://www.sbi.gos.pk/images/Sbi%20achievements.jpg>

²¹ Article 246(c) of the Constitution

- VIII. Orakzai Agency;
- IX. Mohmand Agency;
- X. Khyber Agency;
- XI. Kurram Agency;
- XII. North Waziristan Agency, and
- XIII. South Waziristan Agency.

In the year 2011, according to a notification²² issued by the Civil Secretariat (FATA), the Governor of KP, who is executive head of the tribal areas, will lead the FATA Investment Facilitation Authority (“**FIFA**”) as its chairman, while senior official of different government agencies and representatives of business community will be its members.

4.4.2 Objective, Mandate and Scope

FIFA responsibilities²³ range from oversight, monitoring and regulation of investment-related activities and enterprise development. Likewise, FIFA will support indigenous industry and businesses, develop public private partnerships, formulate policies and mechanism for setting up industrial estates and zones, hold exhibitions, seminars, job fairs and other activities to promote investment in the FATA. FIFA will interact with the banks and facilitate them to extend their coverage and introduce micro credit schemes for Small and Medium Enterprises.

4.4.3 Legal Structure

FIFA is set up through an executive notification²⁴, hence FIFA does not appear to be a separate legal person and independent body.

No credible information is available in regard to FIFA’s organizational structure as well as key activities.

4.5 Baluchistan Board of Investment

The establishment of the board was announced in financial year 2011 budget, however, could not become operational since then²⁵. During his visit to Lasbela Chamber of Commerce & Industry in the last week of November 2013, the incumbent Chief Minister of the Baluchistan Province announced that the Provincial Government was preparing terms of reference of the proposed Provincial Board of Investment²⁶. Credible information in relation to the proposed legal and organizational structure is not available with us.

²² <http://www.dawn.com/news/606149/facilitating-investment-in-tribal-belt>

²³ Ibid.

²⁴ Ibid. The copy of the notification has not been provided. Further evaluation may be made upon provision of the copy of notification and ancillary information

²⁵ <http://tribune.com.pk/story/286778/balochistan-investment-board-body-without-ceo-since-establishment/>

²⁶ <http://www.dawn.com/news/1060108>

5. Review of Existing Investment Facilitation Bodies in KP

5.1 Sarhad Development Authority

5.1.1 Legal Structure

Sarhad Development Authority (“**SDA**”) was set up pursuant to the North-West Frontier Province Sarhad Development Authority Act, 1972 (the “**SDA Act**”). Under the SDA Act, SDA is a body corporate having perpetual succession and a common seal with power, subject to the provisions of the SDA Act, to acquire and hold property, both movable and immovable, and shall by the said name sue and be sued²⁷. The rules under the SDA Act are to be made by the Provincial Government and SDA can make regulations with the prior sanction of the Provincial Government. However, the Act envisages the performance of functions by SDA under the strict scrutiny of the Provincial Government.

The general direction and administration of SDA and its affairs vest in the board consisting of such number of Directors not less than three and not more than five, as may be appointed by Government for a term of 3 years. The Chairman is appointed from amongst the members of the board²⁸. SDA board may exercise all powers and do all acts and things which may be exercised or done by SDA in accordance with the provisions of the SDA Act. The board of SDA, in discharging its functions, acts on commercial considerations and is guided by such directions as KP Government may from time to time give; in case of failure by the board of SDA to follow such directions, the Provincial Government may remove directors including the Chairman²⁹. SDA, subject to such general or special orders as KP Government may from time to time give, appoint officers, advisers and employees as is considers necessary for the efficient performance of its functions, on such terms and conditions as it may determine.

5.1.2 Scope and Objectives

The primary objective of SDA is planning, promotion, organizing and implementing programs for the establishment of industries and commercial ventures. Also, objectives include tendering advice on the technical, operational and commercial feasibility of any program or scheme specified by the Provincial Government.

5.1.3 Comparison with KPBOIT

The legal structure of KPBOIT is different than SDA as KPBOIT is set up under an executive notification, whereas SDA is creation of law. No permanence is attached to KPBOIT, whereas SDA has perpetual status. KPBOIT is not an independent legal person, while, SDA is an independent legal person.

²⁷ Section 2 of the SDA Act

²⁸ Section 6 of the SDA Act

²⁹ Section 5 of the SDA Act

As regards functions vis-à-vis investments, the scope of KPBOIT is broader than the scope of SDA. Functions of SDA are limited to only development of industrial sector, whereas, KPBOIT may also facilitate investments in sectors other than industrial sector. SDA may make investment by itself, however, this scope is limited in case of KPBOIT.

5.2 Small Industries Development Board

5.2.1 Legal Structure

Small Industries Development Board (“**SIDB**”) was set up pursuant to the North-West Frontier Province Small Industries Development Board Act, 1972 (the “**SIDB Act**”). SIDB is a body corporate having perpetual succession and a common seal with power, subject to the provisions of the SIDB Act, to acquire and hold property, both movable and immovable, and shall by the said name sue and be sued. The rules under the SIDB Act are to be made by the Provincial Government and SIDB can make regulations with the prior sanction of the Provincial Government. However, the Act envisages the performance of functions by SIDB under the strict scrutiny of the Provincial Government.

The general administration of SIDB and its affairs vest in the board appointed by Provincial Government. The Minister for Industries of Government of KP is the Chairman of the board. 5 members are from public sector whereas 6 members are from private sector. The SIDA, in discharging its functions, acts on commercial considerations and is guided by such directions as KP Government may from time to time give.

5.2.2 Scope and Objectives

SIDB took over Small Industrial Corporation and the scope of its functions is to promote small industries in KP such as Wood Working, Automotive, Carpet, Knitting, Weaving, Stitching and Leather Goods. SIDB has also established 10 Small Industries Estates (SIEs) throughout the Province, wherein infrastructures facilities such as Roads, Surface, Drainage, Water Supply, Sewerage System, Electricity, Sui Gas and Telephone etc. have been provided for the establishment of small industries.

5.2.3 Comparison with KPBOIT

The legal structure of KPBOIT is different than SIDB as KPBOIT is set up under an executive notification, whereas SIDB is set up under the law. No permanence is attached to KPBOIT, whereas SIDB has perpetual status. KPBOIT is not an independent legal person, whereas SIDB is an independent legal person.

As regards functions, the scope of KPBOIT is broader than the scope of SIDB. Functions of SIDB are limited to only development of industrial sector, whereas, KPBOIT may also facilitate investments in social sectors. SIDB may advance loans to the investors and can act as a financial institution, however, KPBOIT is not given such function.

6. Review of Comparable Regional/International Investment Facilitation Bodies

An indicative list of investment facilitation organization is given below:

6.1 Foreign Investment Promotion Board India

Foreign Investment Promotion Board India (“**FIPB**”) is a body attached to the Department of Economic Affairs; Ministry of Finance³⁰. FIPB is a government body that offers a single window clearance for proposals on Foreign Direct Investment (FDI) in India that are not allowed access through the automatic route.

FIPB comprises of Secretaries drawn from different ministries with Secretary, Department of Economic Affairs, and Ministry of Finance in the chair. This inter-ministerial body examines and discusses proposals for foreign investments in the country for sectors with caps, sources and instruments that require approval under the extant FDI Policy on a regular basis. The Minister of Finance considers the recommendations of the FIPB on proposals for foreign investment up to certain financial limit and proposals over and above such financial limit require the approval of the Cabinet Committee on Economic Affairs (CCEA)³¹.

Thus, FIPB is a body not having an independent legal status and derives its authority from the executive notifications and direct involvement of Minister of Finance.

The role of FIPB is not comprehensive as investment facilitation functions have been entrusted to the Foreign Investment Implementation Authority (“**FIIA**”) set up under the Ministry of Commerce and Industry to facilitate quick translation of Foreign Direct Investment (FDI) approvals into implementation, to provide a one stop after care service to foreign investors by helping them obtain necessary approvals, sort out operational problems and meet with various Government agencies to find solution to their problems.

6.2 Board of Investment Bangladesh

The Board of Investment (“**BBOI**”) Bangladesh was established in 1989 by the Investment Board Act (“**IBA, 1989**”) to encourage investment in private sector, to identify the hindrance of investment and provide necessary facilities and assistance in the establishment of industries. The IBA, 1989 mandated BBOI for providing diversified promotional and facilitating services with a view to accelerating industrial development. In addition, the government also entrusted BBOI with some more functions in its service list; combining all, BBOI's present functions can be categorized as (i) investment promotion; (ii) investment facilitation; and (iii) public advocacy.

³⁰ Government of India Allocation of Business Rules –the Second Schedule

³¹ <http://www.fipbindia.com>

BBOI is a statutory body and is comprised of 15 members including 1 Chairman, 1 Vice Chairman, comprised of the Prime Minister as the Chairperson and 14 Ex-officio members³². Out of the 15 Members, the President of Bangladesh Chamber of Commerce & Industry is a non-Government Ex-officio Member³³. The Prime Minister of Bangladesh or their nominee Minister at BBOI acts as the Chairperson to the BBOI³⁴. BBOI may nominate a maximum of four further members³⁵. In order to implement the decisions of the BBOI and advice the BBOI, there is an Executive Committee to the BBOI, which comprised of Executive Chairman and not more than 6 members appointed by BBOI. The Executive Chairman also acts as the Chief Executive Officer of BBOI³⁶. BBOI may constitute committees for the purposes of its functions under IBA, 1989 and delegate its powers to the Executive Committee or committees³⁷. Also, BBOI may appoint such officers, and other employees and advisors or councilors for the purposes of IBA, 1989³⁸. The Government has power to make rules in order to implement the purposes of IBA, 1989³⁹.

The services include investment promotion and facilitation covering support, suggestion and aftercare support to the investors. The prime vision of BBOI is to promote domestic and foreign investment as well to enhance international competitiveness of Bangladesh and contribute to overall social and economic development of Bangladesh⁴⁰. It is mandatory for every undertaking to obtain licence from BBOI to invest in non-government sector non-governmental industry other than an industry under the control of the Bangladesh Export Processing Zones Authority and the Bangladesh Small and Cottage Industries Organization. BBOI may grant license subject to certain conditions. BBOI is also empowered to determine import quotas and royalties and fees in respect of the licensed industries⁴¹. It is obligatory on all related Government departments to assist and facilitate the investment by the licensees of BBOI⁴².

6.3 Board of Investment of Sri Lanka

The Board of Investment of Sri Lanka (“**BOISL**”) was set up in 1978 under Board on Investment of Sri Lanka Law, enactment No. 4 of 1978 (“**BOISLL**”). The functions ascribed to BOISL are to: (a) foster and generate the economic development of Sri Lanka; (b) widen and strengthen the base of the economy of Sri Lanka; (c) encourage and promote foreign investment within Sri Lanka; (d) diversify the sources of foreign exchange earnings and to increase the export earnings; (e) encourage and foster the establishment and development of industrial and commercial enterprises within Sri Lanka; (f) administer the affairs of the area of authority of BOISL; and (g) to do all such other acts as may be necessary or conducive to the attainment of any or all of the aforesaid objects⁴³.

³² Section 6(1) of IBA, 1989

³³ Section 6(1)(m) of IBA, 1989

³⁴ Section 6(2) of IBA, 1989

³⁵ Section 6(3) of IBA, 1989

³⁶ Section 8 of IBA, 1989

³⁷ Section 19 & 21 of IBA, 1989

³⁸ Section 20 of IBA, 1989

³⁹ Section 22 of IBA, 1989

⁴⁰ <http://boi.gov.bd>

⁴¹ Sections 11, 12 & 13 of IBA, 1989

⁴² Section 14 of IBA, 1989

⁴³ Section 3 of BOISLL

BOISL is comprised of 6 members, one of whom is Director General (also, Chief Executive Officer of the board⁴⁴) and another is Additional Director General, appointed by the President for the period of 5 years. A member may resign earlier and, the President may, in his absolute discretion, terminate a member any time prior to 5 years without assigning any reason⁴⁵. BOISL may make rules for regulation of procedure and transaction of business at its meetings⁴⁶, quorum of which is 3 members⁴⁷.

BOISL has powers to conditionally delegate its functions to Director General or Additional Director General⁴⁸. BOISL may appoint such staff as it deem necessary for the purposes of BOISL. Moreover, BOISL, upon directions and information to the Minister concerned, has power to appoint, dismiss and disciplinary control over the staff⁴⁹ and any member of BOISL and the staff is deemed to be public servant⁵⁰. BOISL may set up such departments or agencies and delegate functions to them, as it deems necessary⁵¹.

It is lawful for BOISL to enter into any agreements and grant exemptions from certain laws, as prescribed by BOISLL, and amend or modify such laws to the extent of an enterprise with whom BOISL enters into an agreement⁵².

BOISL may, with the approval of the Minister, make rules relating to the exercise, performance and discharge of the powers, duties and functions vested in or assigned to it, including the power to impose or levy any charge or fee, and in respect of any matter for which rules are authorized to be made⁵³.

6.4 Investment Department in Turkish Republic

The Republic of Turkey Prime Ministry Investment Support and Promotion Agency (“ISPAT”) is the official organization for promoting Turkey’s investment opportunities to the global business community and providing assistance to investors before, during and after their entry into Turkey. ISPAT serves as a reference point for international investors and as a point of contact for all institutions engaged in promoting and attracting investments at national, regional and local levels. ISPAT’s services include, but are not limited to⁵⁴:

- Market information and analyses
- Industry overviews and comprehensive sector reports
- Assessing conditions for investments
- Site selection
- Finding companies for potential partnerships and joint ventures
- Negotiations with relevant governmental institutions

⁴⁴ Section 11(1) of BOISLL

⁴⁵ Section 6 of BOISLL

⁴⁶ Section 9(a) of BOISLL

⁴⁷ Section 10 of BOISLL

⁴⁸ Section 12 of BOISLL

⁴⁹ Section 13 of BOISL

⁵⁰ Section 33 of BOISL

⁵¹ Sections 14 & 15 of BOISLL

⁵² Section 17 of BOISLL

⁵³ Section 18(1) of BOISLL

⁵⁴ <http://www.invest.gov.tr/en-US/theagency/Pages/OurServices.aspx>

- Facilitating legal procedures and legislation issues, such as: establishing business operations - Incentive applications - Getting licenses- Work/residence permits

ISPAT is set up vide Law No. 5523 of 2006 (“**ISPAT Law**”) and is comprised of Consultancy Board, major service units and other advisory and ancillary services⁵⁵. Consultancy Board comprises Ministries assigned by the Prime Minister and representatives from private sector. President of ISPAT, who is appointed by the Prime Minister, is a member as of right. The Prime Minister is Chairman of board⁵⁶. The President of ISPAT and his executives may delegate their powers in writing⁵⁷. Following are major service units of ISPAT⁵⁸:

- (i) Directorate Investment Promotion Services;
- (ii) Director of Investor Services;
- (iii) Department of Collaboration Development Agencies; and
- (iv) Department of Private-Sector Collaboration.

ISPAT’s Consultancy Unit comprises Legal Department and Ancillary Services Unit from Human Resources and Support Services Department⁵⁹. ISPAT’s budget comprises of the following sources:

- (i) Income from services rendered by ISPAT;
- (ii) Allocation from Prime Minister’s Budget; and
- (iii) Aid fund and donations.

ISPAT may make regulations for accounts and budgets⁶⁰. ISPAT may hire staff to a maximum of 60 personnel and the terms and conditions of their service are governed by the employment laws of Republic of Turkey⁶¹.

ISPAT may undertake research, feasibility and project studies and other processes relating to the activities within its scope, by concluding contracts according to the principles set out in the relevant regulation⁶².

6.5 Malaysia Investment Development Authority

The Malaysian Investment Development Authority (“**MIDA**”) is the Malaysian government’s principal agency for the promotion of the manufacturing and services sectors in Malaysia. It was incorporated as a statutory body under the Malaysian Industrial Development Authority Act, 1965. The Malaysian Prime Minister may decide to invite other public sector representatives in the board meeting.

MIDA assists companies which intend to invest in the manufacturing and services sectors, as well as facilitates the implementation of their projects. The wide range of services provided by MIDA include providing information on the opportunities for investments, as well as facilitating companies which are looking for joint venture partners.

⁵⁵ Article 4 of ISPAT Law

⁵⁶ Article 5 of ISPAT Law

⁵⁷ Article 6(6) of ISPAT Law

⁵⁸ Article 7 of ISPAT Law

⁵⁹ Article 8(1) of ISPAT Law

⁶⁰ Article 9(2) of ISPAT Law

⁶¹ Article 10 of ISPAT Law

⁶² Article 11 of ISPAT Law

MIDA evaluates the following applications for projects in the manufacturing and its related services sectors:

- Manufacturing licenses
- Tax incentives
- Expatriate posts
- Duty exemptions on raw materials and components
- Duty exemptions on machinery and equipment for agricultural sector and selected services sector

6.6 Thailand Board of Investment

Thailand Board of Investment (“**BOI**”) is set up under Section 6 of the Investment Promotion Act, B.E. 2025 (“**IPA**”). The Prime Minister has charge and control of IPA and power to make appointments under IPA⁶³. BOI is comprised of the Prime Minister as Chairman, the Minister of Industry as Vice Chairman, not more than ten other competent persons appointed by the Prime Minister to act as members, and the Secretary General as member and secretary to the Board, having the powers and duties under IPA. The Prime Minister may appoint not more than five other competent persons to act as advisors.⁶⁴ The members and advisors of BOI are appointed for the term of 2 years. The office of BOI is administered by the Secretary General who is responsible for the administration of the office and directly under the Prime Minister. There is Deputy Secretary General (s) and there may also be an Assistant Secretary General to assist the Secretary General in carrying out his duties. The Secretary General, Deputy Secretary General (s) and Assistant Secretary General are ordinary civil servants⁶⁵. In the performance of duties under IPA, the BOI may authorize the BOI office to act on its behalf, appoint subcommittees to perform any assigned duties, or summon any person concerned to give facts, explanations, advice or opinions. Upon completion of the assigned duties, the BOI office or the sub-committees, as the case may be, report to BOI⁶⁶.

Investment, under IPA, is a licensed activity and may not be carried out without registration with BOI⁶⁷. IPA provides for all incentives in relation to taxation (direct and indirect), imports and exports, protection from nationalization, competition by state, price control and foreign exchange etc. to the investors⁶⁸.

6.7 Nepal Board of Investment

Investment Board Nepal (“**IBN**”) was created under the Investment Board Nepal Act, 2068 (“**IBN Act**”). IBN is entrusted to promote economic development of the country by creating an investment-friendly environment by means of mobilizing and managing public-private partnership, cooperative and domestic and foreign private investments⁶⁹.

IBN is comprised of Prime Minister as Chairman; Minister specifically assigned for IBN as Vice Chairman; Minister of Finance as Member; Minister for Industry as Member;

⁶³ Section 5 of IPA

⁶⁴ Section 6 of IPA

⁶⁵ Section 13 of IPA

⁶⁶ Section 11 of IPA

⁶⁷ Chapter 2 of IPA

⁶⁸ Chapters 3 & 5 of IPA

⁶⁹ http://www.investmentboard.gov.np/page/about_us/investment_board_nepal.html

Minister for Forests as Member; Vice-Chairperson of the National Planning Commission as Member; Governor of Nepal Rastra Bank as Member; Chief Secretary of Government of Nepal as Member; Four persons including at least one female, nominated by IBN from among experts from the industry, tourism, infrastructure development, commercial law and finance sectors as Members; and Chief Executive Officer of the IBN office as Member-Secretary⁷⁰. The members are appointed for two years. IBN is entrusted with rule making power for the purposes of IBN Act⁷¹. The Chief Executive Officer is appointed from private sector and is responsible for overall administration of IBN.

IBN has a wide range of powers, from identification of investment projects to seek bids and issuing licenses and implementation of the projects. IBN has the powers to develop and implement investment policies, announce incentives and grant exemptions to the investors. One of the salient features of IBN Act is that upon grant of license by IBN, the investor is not required to obtain any other licenses under the prevailing law.

6.8 Mauritius Board of Investment

Board of Investment Mauritius (“BOI”) is the national investment promotion agency of the Government of Mauritius with the mandate to promote and facilitate investment in the country⁷². BOI was set up pursuant to Investment Promotion Act, 2000 (“**Mauritius IPA**”) and consists of a Chairperson appointed by the Prime Minister, after consultation with the Leader of the Opposition and not less than 6 and not more than 12 other members appointed by the Prime Minister from representatives of the public sector, private sector, academia and trade unions appointed for three years⁷³. The Minister may, in relation to the exercise by BOI of any of its powers under Mauritius IPA, after consultation with BOI, give such directions of a general character to BOI as he considers necessary in the public interest, and BOI shall comply with those directions⁷⁴. The chief executive officer of BOI is known as Managing Director, appointed by BOI on such terms and conditions as appropriate, and is responsible for the execution of the policy of BOI and for the control and management of the day-to-day business of BOI. Managing Director is also empowered to delegate his powers to an employee. Managing Director is entitled to attend BOI meetings and board may assign Managing Director such tasks as deemed appropriate.⁷⁵

BOI acts as investor registration authority⁷⁶ and a person registered with BOI may request for facilitation with regards to relevant public sector agencies in respect of implementation of his investment and upon receipt of such application BOI may issue appropriate directions to the relevant public sector agencies to facilitate the investor⁷⁷.

BOI may make such employments as it deem required for the purposes of its functions. There is a general fund of BOI wherein grants from the government, donations and fees

⁷⁰ Section 3 of IBN Act

⁷¹ Section 22 of IBN Act

⁷² <http://www.investmauritius.com/about-us.aspx>

⁷³ Section 4(2) and 4(3) of Mauritius IPA

⁷⁴ Section 9(1) of Mauritius IPA

⁷⁵ Section 10 of Mauritius IPA

⁷⁶ Part-III of Mauritius IPA

⁷⁷ Part IV-A of Mauritius IPA

is received.⁷⁸ The Minister of BOI has power to make regulations for the purposes of the Mauritius IPA and also, he may enter into investment protection agreements⁷⁹.

6.9 China Department of Foreign Investment Administration

Department of Foreign Investment Administration, China (“**DFIAC**”) is a department of Ministry of Commerce, Peoples Republic of China (“**MOFCOM**”). MOFCOM is headed by a Minister.

Major functions of DFIAC include: (I) to provide macro-guidance to and carry out general management of nationwide efforts in foreign investment promotion; (II) to analyze and study the trend of cross-border investment and nationwide foreign investment situations, reporting developments to the State Council, coordinating opinions among relevant departments, and developing suggestions on key issues concerning foreign investment; participation in the formulation of development strategies and mid-term and long-term plans for foreign investment; (III) to draw up laws and regulations on foreign investment absorption, formulate relevant rules, policies and reform schemes and organize the implementation, and supervise and examine the enforcement; to participate in the formulation and release of the Catalogue Guiding Foreign Investment in Industry; to formulate policies concerning the transfer of assets, equity rights and management rights to foreign investors as well as related merger and acquisition, contract operation and leasing issues; to coordinate with the departments concerned and formulate programs on foreign investment utilization in trade in services and organize the implementation; (IV) to administer and guide the examination and approval as well as filing of foreign investments nationwide. To examine and approve the establishment, contracts and articles of association as well as alteration of foreign-funded enterprises whose investment amount exceeds the upper limit prescribed by the State or as provided in relevant rules and regulations; to examine and approve the contracts, articles of association and other significant alterations of large-sized foreign-funded projects or as provided by law; to examine and approve foreign investment projects in the commercial circulation sector in collaboration with departments and bureaus concerned; (V) handling and replying to applications by foreign investors for merging with or acquiring domestic enterprises; to work with relevant agencies to establish the inter-ministry joint meeting for security review of merger and acquisition of domestic enterprises by foreign investors and participate in the formulation of the catalogue of security review of merger and acquisition of domestic enterprises by foreign investors; to be responsible for submitting M&A deals that fall within the scope of security review to the inter-ministry joint meeting for security review; (VI) To monitor and examine foreign-funded enterprises’ compliance with relevant laws and regulations as well as contracts, coordinate to solve problems for foreign-funded enterprises, lead the joint annual inspection of foreign-funded enterprises, undertake the statistics and overall analysis on foreign investment; (VII) to establish multilateral and bilateral investment promotion mechanisms and organize major cross-region activities on investment promotion and presentation of foreign investment policies, lead the coordination of China’s positions on investment issues in multilateral, bilateral and regional negotiations, design negotiation plans, undertake negotiations with foreigners, and take part in the negotiations on bilateral investment treaties; (VIII) to guide and coordinate national economic and technological development zones, Suzhou Industrial Park and border (cross-border) economic cooperation areas, formulate and implement

⁷⁸ Part V of Mauritius IPA

⁷⁹ Part VI of Mauritius IPA

development strategies, policies, laws and regulations, liaison special economic zones, bonded areas, comprehensive bonded areas, bonded ports and export processing zones for foreign investment attraction; (IX) to lead the research on policies promoting regional opening-up, coordinate border and other regions to open wider; (X) guide and coordinate the construction of platforms like industrial transfer and investment promotion center and demonstration parks, optimize the pattern of foreign investment, coordinate, guide and monitor the complaints of foreign investment enterprises nationwide; (XI) to undertake other assignments given by the leaders of the Ministry.

6.10 Conclusion

From an overview of the regional as well as global similar investment facilitation agencies, the following were observed:

- (i) All agencies, except China and India, are set up under an enactment and are creation of law through a statutory instrument;
- (ii) In majority of agencies, the Chief Executive/Prime Minister of the respective countries directly heads and controls these agencies;
- (iii) Owing to the role entrusted to such agencies i.e. facilitation of investors through liaison with other governmental departments; the relevant ministries and departments, in particular, Investment, Commerce, Trade, Investment, Finance and Planning are essentially part of the premier arm (i.e. board) and have due representation on the boards of the agencies for the purposes of ensuring smooth, efficient and effective coordination *inter se* the body and other governmental departments;
- (iv) These agencies in certain cases are empowered to issue licenses/registration certificates to the investors, in particular, in the case of Thailand Board of Investment, a license is conclusive license for all purposes of the projects, which is distinct and key feature for attracting investment;
- (v) In majority of the cases, the relevant boards of investment may even undertake investment projects;
- (vi) Majority of the boards of investments enjoy a superior statutory authority, they are the bodies which can refer the investors to any relevant authority and such reference holds force as the governmental bodies are obliged to follow their instructions;
- (vii) Generally all boards of investment are financially and operationally independent. The funding is through allocation of budget or grant; and/or their own earnings i.e., donations, fees, loans, investments and joint venture projects. In case of India, FIPB and FIIA are part of the Ministry of Economic Affairs and Ministry of Commerce, respectively, hence do not enjoy the status of an independent person being part of the Government itself.

7. Analysis of Possible Legal Options

7.1 Provincial Government Department

7.1.1 Setting up Requirements

In order to perform functions ascribed under the Constitution, the Provincial Government, under KP ROB can set up various Departments. These departments are part of the Provincial Government just as the ministries are part of the Federal Government. However, in the Provincial Governmental framework the terminology used is Department and not Ministry. Under these Departments, there can be attached departments or the departments can be the reference Department of autonomous or semi-autonomous bodies. The Chief Minister may, with the consultation of the Governor, whenever he deem fit, transfer any particular subject or matter from the Department to which it stands assigned in accordance with Schedule II of the KP ROB to any other Department. Furthermore, the Chief Minister may assign a Department or part of the Department or part of different departments or one or more Departments together with one or more Departments with parts or parts of other Departments to a Minister and the Departments not so assigned remain in charge of the Chief Minister⁸⁰.

In view of the above, under the KP ROB, the Chief Minister of KP may, in consultation with the Governor, wherever he deems fit, constitute a Department or vary composition of existing Department⁸¹. In order to create a Department, Chief Minister would be required to issue an executive notification amending the Schedule-I to KP ROB thereby including a new Department namely, "Department of Investment and Trade". Besides, Schedule-II of KP ROB would also be amended to assign business to KPBOIT. One of the members of the cabinet may be appointed as Minister-in-Charge. A secretary of KP Government is appointed as Secretary of Investment Department and under him, there is hierarchy of Provincial Government employees to assist. As in terms of Rule 4(3) of KP ROB, *"[t]he Secretary shall, by means of standing orders, distribute the work of the Department among the officers, branches and/or sections. Such order may specify the cases or class of cases which may be disposed of by an officer subordinate to the Secretary"*.

7.1.2 Level of Operational and Financial Autonomy

The framing of the policy of the Department is the responsibility of the Minister, and it shall be the duty of the Secretary to advise the Minister in the formulation of policy⁸². The business of the Department is disposed of by or under the authority of the Secretary. He is responsible to the Minister for the proper conduct of business and for ensuring that the sanctioned policy of the Minister is duly executed⁸³. However, the Finance department of the Provincial

⁸⁰ Rule 3 and 4 of KP ROB. Please also refer to Section 3.3 above

⁸¹ Rule 3(2) of KP ROB

⁸² Rule 5(1) of KP ROB

⁸³ Rules 5(2) of KP ROB

Government is authorized to framing of financial rules for guidance of Departments and supervision of maintenance of accounts⁸⁴. Hence, financial autonomy would not be available to KPBOIT in case it is made a Department of the Provincial Government.

The employees of the Departments are appointed from within the Provincial Government's civil service and they may be transferred to and from the Department. Hence, no consistency or organizational history and ownership is carried by the staff. This also impacts on the efficiency and performance of the organization like KPBOIT, which requires a proactive and robust functionality on part of the employees.

Operational autonomy is also affected due to frequent interface with the other Departments e.g. KPBOIT would not be able to hire its own financial, technical or legal consultants. For each of the functions, it would have to refer the matter to the relevant Departments such as Finance, Law etc. for advice and guidance, where particular commercial or legal expertise may not be available. Moreover, there is a reporting requirement regarding any matter pending in the Department to the Chief Secretary on call basis⁸⁵, which might be an unnecessary overarching control over the Department like KPBOIT.

7.1.3 Financial Responsibilities

A Department of the Provincial Government is not made to raise finances from sources other than those provided by the Provincial Government. For each of the financial expenditure, the Department is required to submit a budget requisition in the beginning of the financial year. It is not possible for the Department to revise its budget during a financial year. The Auditor General audits the accounts of a Department of the Provincial Government. Any objection by the Auditor General's office is generally taken to the Public Accounts Committee of the Provincial Assembly.

7.1.4 Advantages/Disadvantages

In terms of status a distinct Department as an executive branch of the Government carries a high profile. It functions as "Government" and enjoys and can assert higher authority. However, disadvantages are that a Department cannot function independently. It has to strictly follow the KP ROB, which prescribes consultation among various Departments of the Provincial Government as well as submission of cases for approval of the Cabinet or the Chief Minister in most of the cases⁸⁶. The other Departments in the Provincial Government again strictly follow their mandate and procedure under the KP ROB. Accordingly, a Department is dependent on other Departments for its performance. Another disadvantage of a Department is that it may be combined or merged with other Departments⁸⁷. If so motivated politically, a Chief Minister may dissolve a Department any time by merely issuing a notification.

Examples of Provincial Government Departments are many, however, in relation to the functions of KPBOIT, Department of Commerce and Industry may be

⁸⁴ Schedule-II to KP ROB

⁸⁵ Rule 9(2) of KP ROB

⁸⁶ Rule 8(1)(b) of KP ROB – "*no orders shall issue, nor shall the case ordinarily be submitted to the Chief Minister or the Cabinet until it has been considered by all the Departments concerned and they agree to it*"

⁸⁷ Rule 3(2) of KP ROB

relevant. Present Industries, Commerce and Technical Education Department⁸⁸ (which is administrative head of KPBOIT) was previously Industries, Commerce, Labour, and Mineral Development & Technical Education Department⁸⁹. This makes clear that the Departments of the Provincial Government are volatile and may be reconstituted, merged or even dissolved at any time.

7.2 Attached Department by Executive Notification

7.2.1 Setting up Requirements

An Attached Department to a Department is a unit of Provincial Government, which is mentioned as an Attached Department in Column 3 of Schedule I to the KP ROB⁹⁰. The Provincial Government may by notification set up an Attached Department. The functions are prescribed/assigned to an Attached Department in the notification founding and creating the same.

7.2.2 Level of Operational and Financial Autonomy

An Attached Department does not enjoy status of an independent legal person and is essentially part of the Department to whom such Attached Department is attached. An Attached Department also does not have overriding role over the other government organizations. The Chief Secretary of the Provincial Government can call for any case or any information from the Attached Department⁹¹.

Employees of units are government employees, however, the Attached Departments are given mandate to appoint experts from private sector on contract basis. There may be a combination of government servants appointed in Attached Departments on deputation and staff hired on contract basis and the role of the Secretary of the Department is important in such matters.

Moreover, the operations of an Attached Department are subject to scrutiny by the Establishment & Administration Department of the Provincial Government, which may carry out “[p]eriodic review of the organization staff, function and procedures of the Departments, Attached Departments and Subordinate Offices, and suggestions for improvement thereof”⁹².

An Attached Department may be dissolved by another executive notification of the Provincial Government⁹³.

7.2.3 Financial Responsibilities

Unlike a Department of Provincial Government, an Attached Department may raise funds also from its own sources such as by way of charging fee for any services/facilitation provided. However, being an Attached Department of the Provincial Government, it is subject to audit by the Auditor General and

⁸⁸ As reflected vide notifications dated 10 September 2013 or 31 October 2013

⁸⁹ Please see Sr. 12 of Schedule-I to the KP ROB placed at <http://www.khyberpakhtunkhwa.gov.pk/cms/downloads/kp.gov.pk-downlaods-%20d2ab7947561162f8836f49d9b7f098ed.pdf> last visited on 16 June 2014

⁹⁰ Rule 2(b) of KP ROB – “Attached Department” is defined to mean “a Department mentioned in Column 3 of Schedule-I”

⁹¹ Rule 9(2) of KP ROB

⁹² Schedule-II to KP ROB [Functions of Establishment & Administration Department]

⁹³ As may be seen from the Notification dated 12 September 2012 that various departments of KP Government having more than 30 years of standing (such as Investment Facilitation Board and Investment Facilitation Committee) were dissolved

accordingly, may be examined by the Public Accounts Committee of the Provincial Legislature.

7.2.4 Advantages/Disadvantages

Advantage of an Attached Department is that despite being part of a Government, an Attached Department is not subject to certain limitations⁹⁴ in respect of their operations and performance of functions. An Attached Department may have more financial and operational independence. However, a major disadvantage that remains with the Attached Department is, that while dealing with an entity which is of superior character (such as a Provincial Government Department, a Statutory Body, a Ministry of Federal Government or a Regulatory Body), the Attached Department may not carry that weight. It does not enjoy status of a legal person and it has to communicate such entities through the governing Department⁹⁵. Thus to say the least, it neither adds a profile nor enjoys a status or possess powers that can in effect make it operationally and financially independent.

Column 2 of Schedule-I to the KP ROB provides a list of Attached Departments of the KP Government. These include Directorate General of Mines & Minerals; Directorate of Science & Technology; Directorate of Transport; Board of Revenue (Revenue Department); Bureau of Statistics.

In relation to investment, SBI in Sindh Province is an Attached Department under the Finance Department of Government of Sindh.

7.3 Autonomous Body

7.3.1 Procedural Requirements for establishing an Autonomous Body

KP ROB envisages setting up of an autonomous under an Act of Provincial Legislature or Ordinance by the Governor⁹⁶. A Provincial Legislature derives its legislative powers from Article 127 of the Constitution⁹⁷. A bill is moved to the Provincial Legislature by any member, which is passed by the house and sent to the Governor for assent. In case the Provincial Government moves a legislative bill, it has to follow certain procedures within the Provincial Government as prescribed by the KP ROB. As a first step, the concerned Department (in case of KPBOIT it is Department of Industries, Commerce and Technical Education) expresses its desirability of legislation and forwards a memorandum to the Law Department indicating precisely the lines on which it is proposed to legislate. The memorandum may include:

- (i) a draft bill;
- (ii) a statement of object and reasons

The Law Department, apart from giving shape to the draft legislation, advises the concerned Department whether any sanction is required under existing statutory provisions and whether any further legal requirements are to be

⁹⁴ For example tedious consultation process among various Departments is not required in case of an Attached Department

⁹⁵ Rule 39(4) of KP ROB – “All correspondence between the Government and the heads of Attached Departments shall be conducted through the Secretary of the Department concerned”

⁹⁶ Rule 3(b) of KP ROB

⁹⁷ Article 127 of the Constitution incorporates provisions relating to legislative procedure of Federal Legislature by reference. The reference to such articles in this Section of the paper are referred to accordingly

compiled with. The Law Department also advises whether the proposed law disregards or violates, or is not in accordance with the principles of Law making. The concerned Department, after obtaining the approval of the Cabinet in terms of Rule 19, returns the draft legislation to the Law Department for further action. The proper function of Law Department is to correct form all proposed legislation⁹⁸. Legislation includes a bill as well as an ordinance. Upon finalizing the proposed draft, the bill is sent to the Cabinet for approval⁹⁹. Upon approval by the Cabinet, the bill is sent to the Provincial Assembly to be tabled in the upcoming session.

It is pertinent to mention that as per Article 67 of the Constitution of Pakistan, “*a House may make rules for regulating its procedure and the conduct of its business..*” It should be noted that “conduct of business” in this context includes legislative powers. Accordingly, pursuant to Article 67, KP Assembly has framed the Khyber Pakhtunkhwa Rules of Procedure (“**KP ROP**”) which lay down the procedure for enactment of an Act of the Provincial Legislature. The procedure is discussed in detail below.

Firstly, any Member other than a Minister must give fifteen days’ notice of motion for leave to introduce a Private Members’ Bill, along with a copy of the Bill and a full statement of objects and reasons.¹⁰⁰ Similarly, a Minister must give written notice of his intention to move for leave to introduce a Bill. However, no statement of objects and reasons is required for a Bill which stands introduced in the Assembly pursuant to Article 128(3) of the Constitution.¹⁰¹

When the item is called, the Member-in-Charge shall move to introduce the Bill and upon the motion being made, the Bill shall stand introduced.¹⁰² When an Ordinance is laid before the Assembly under Article 128(2) of the Constitution, it shall be deemed to be a Bill introduced in the Assembly.¹⁰³ If notice is given of a motion to introduce a Bill or move an amendment which in the Speaker’s opinion cannot be introduced without previous consent of the KP Government, the Speaker shall refer the same to the Government and the notice shall not be place on the List of Business unless the Government informs the Speaker that the necessary consent has been granted.¹⁰⁴ If a motion for leave to introduce a Bill is opposed, the Speaker may after permitting statements from the Member who moves the Bill and Member who opposes the motion, put the question without further debate.¹⁰⁵

As soon as may be after a Bill has been introduced, it shall be published in the official Gazette. A Bill which stands introduced under Article 128(3) of the Constitution is not required to be published.¹⁰⁶

When a Bill is introduced or subsequently, the Member-in-Charge (As per Rule 83(2) of KP ROP, this means in the case of a Government Bill- any Member acting on KP Government’s behalf and in any other case, the Member who

⁹⁸ Rule 12(3) of KP ROB

⁹⁹ Rule 19 of KP ROB

¹⁰⁰ Rule 77 of KP ROP

¹⁰¹ Rule 78(3) of KP ROP

¹⁰² Rule 78(4) of KP ROP

¹⁰³ Rule 78(5) of KP ROP

¹⁰⁴ Rule 79 of KP ROP

¹⁰⁵ Rule 80 of KP ROP

¹⁰⁶ Rule 81 of KP ROP

introduced the Bill) may make any of the following motions in regard to the Bill after copies of the Bill have been made available for use of Members; (a) that it be considered by the KP Provincial Assembly either at once or at some specified day or (b) that it be referred to the appropriate Standing/Select Committee or (c) that it be circulated for eliciting opinion by a specified date.¹⁰⁷ On the day any of the motions is made or on any subsequent day, the principles of the Bill and its provisions may be discussed generally but the details of the Bill shall not be discussed and no amendments may be moved at this stage.

Where a Bill is circulated to elicit opinion, the Member-in-Charge if he wishes to proceed with the Bill must move that the Bill be referred to a Select Committee unless the Speaker allows a motion to be made that the Bill be taken into consideration.¹⁰⁸ The Select Committee shall comprise of the Minister to whose Department a Bill relates, the Member-in-Charge, Minister for Law and Parliamentary Affairs, Advocate General and either the Deputy Speaker or Member of the panel of Chairmen along with other members appointed by the KP Provincial Assembly when the motion that the Bill be referred to the Committee is made.¹⁰⁹ A Select Committee may hear expert evidence and representative of any special interest affected by measures before it¹¹⁰ and shall have power to make amendments in the Bill where it deems necessary provided the same are relevant to the subject matter of the Bill and not beyond its scope.¹¹¹

As soon as may be after the Bill has been referred to the Select Committee, the Committee shall meet from time to time to consider the Bill and make a report specifying whether in the opinion of the Committee the Bill has been altered so as to require republication.¹¹² The report along with minutes of dissent (if any), shall be presented to the KP Provincial Assembly by the Member-in-Charge of the Bill and there shall be no debate at this stage.¹¹³ Following presentation of the Select Committee's report, the Member-in-Charge may move that the Bill reported by the Committee be (a) taken into consideration or (b) re-committed to the Select Committee or (c) be circulated or re-circulated for eliciting opinion.¹¹⁴

When a motion that a Bill be taken into consideration is made, any Member may move an amendment in the Bill¹¹⁵ which shall be relevant to the subject matter of the Bill and clause to which it relates¹¹⁶. If notice of a new clause or proposed amendment has not been given two clear days before the day on which the new clause is moved or consideration of the clause proposed to be amended is commenced, any Member may object to the moving of the new or clause or amendment.¹¹⁷ The Speaker shall have discretion to submit the Bill or any part of it to the Assembly clause by clause and the Speaker may put as one question

¹⁰⁷ Rule 82 of KP ROP

¹⁰⁸ Rule 85 of KP ROP

¹⁰⁹ Rule 86 of KP ROP

¹¹⁰ Rule 92 of KP ROP

¹¹¹ Rule 93 of KP ROP

¹¹² Rule 94 of KP ROP

¹¹³ Rule 95 of KP ROP

¹¹⁴ Rule 97 of KP ROP

¹¹⁵ Rule 98 of KP ROP

¹¹⁶ Rule 99 of KP ROP

¹¹⁷ Rule 100 of KP ROP

a group of clauses to which no amendments have been offered.¹¹⁸ Moreover, amendments shall be considered in the order specified in Rule 103 of the KP ROP. A Member proposing a new clause on consideration of the Bill shall ask for leave to move the clause and if leave is given, may move it. Members may support or oppose the clause and amendments may be proposed to the clause. Following disposal of amendments, the Speaker shall put the question that the clause be added to the Bill.¹¹⁹

When a motion that a Bill be taken into consideration has been made and the Bill has been considered clause by clause and no amendment is made, the Member-in-Charge may at once move that the Bill be passed. If amendments have been made in the Bill, the Speaker may on his own motion and on the request of any Member direct that the Bill be examined to report what amendments should be made in the Bill as a matter of drafting by a committee and such report shall be presented within the period specified by the Assembly. Following presentation of the report and Assembly's decision on the proposed amendments, the Member-in-Charge may at once move that the Bill be passed¹²⁰ and the discussion on the motion that the Bill be passed shall not include reference further than necessary to the details of the Bill.¹²¹ The Member-in-Charge of a Bill may at any stage move for leave to withdraw the Bill.¹²² Where any of the motions specified in Rule 107(2) of the KP ROP in regard to a Bill is rejected by the Assembly, no motion shall be made with reference to the Bill within six months of the date of rejection.

When a Bill has been passed by the Assembly, the Speaker shall have the power to correct patent errors and make other changes in the Bill as are consequential on the amendments accepted by the Assembly¹²³ and a copy signed by the Speaker shall be presented by the Secretary to the Governor under Article 116 of the Constitution¹²⁴. Finally, when a Bill passed by the Assembly is assented to or deemed to have been assented to by the Governor or under Article 116 of the Constitution, the Speaker shall immediately cause it to be published in the Gazette as an Act of the Provincial Legislature.¹²⁵

The characteristics of a statutory body are mainly that it is an entirely independent legal person; can hold property in its own name and can sue and be sued in its own name; purposes are defined by law; regulated by its own rules and regulations; and cannot be extinguished except by operation of law. Moreover, the law may provide a statutory body an overriding role against other Government organizations. The role of the Government is limited to; the appointment of the head of the body and its members; extending financial support to the body; giving approvals of the rules; obtaining annual reports; and issuing policy directives. The Government does not interfere in a statutory body's day to day functions; hiring of employees; terms and conditions of their service; retirement plans; financial matters; and contracts etc. The employees of

¹¹⁸ Rule 102 of KP ROP

¹¹⁹ Rule 104 of KP ROP

¹²⁰ Rule 105 of KP ROP

¹²¹ Rule 106 of KP ROP

¹²² Rule 107(1) of KP ROP

¹²³ Rule 108 of KP ROP

¹²⁴ Rule 109 of KP ROP

¹²⁵ Rule 110 of KP ROP

these bodies are public servants. Pak BOI is an example and discussed in detail above.

7.3.2 Level of Operational and Financial Autonomy

A statutory body is an independent legal person and is of perpetual succession, can hold property and can sue and be sued in its own name. By virtue of its permanent legal structure, it is financially and operationally more autonomous than a body formed under any other structure. The law creating such entity defines objectives of a statutory body and such objective cannot be modified or amended except by virtue of a legislative amendment. Also, if the law provides guidelines for operation of a statutory body, there would be less chances of influence or intervention from the external organizations. Importantly, the statutory body has powers to make rules (with the consent of the concerned Department) and such other regulations can be framed as may be required to carry out the purposes of the statute creating such body.

The role of the Government, in case of statutory body, is generally limited to issuing notifications for appointment of the board, its Chief Executive Officer, determining their terms of emoluments and giving approvals for rule making and reviewing performance/annual reports only. However, some of the autonomous bodies still get their funding or grants from the Government. Generally, most of the regulators in Pakistan enjoy autonomous status such as, SECP, Competition Commission of Pakistan, Pakistan Telecommunication Authority, Oil and Gas Regulatory Authority, and Pakistan Electronic Media Regulatory Authority. One important aspect in this regard is that through the statute apart from giving the body a higher status, such as the law having an overriding effect over other laws, the administrative interference in the working of KPBOIT can be restricted by restricting the Government's powers to issue policy directives not in consistent with the provisions of the subject statute.

The law provides for the funding provisions and confers financial powers by making them administratively independent in empowering it to make and approve its own budget, hire and terminate human resource, make investments and incur expenditure without any intervening powers of the ministry/Department.

7.3.3 Financial Responsibilities

The financial responsibilities of a statutory body are given in the statute governing such body and usually provide for maintain books of accounts. The important feature of financial responsibility of a statutory body is that the body is generally required to submit its annual report to the Government. The audit is generally conducted by the Auditor General of Pakistan.

7.3.4 Advantages/Disadvantages

Statutory body is a separate legal person, therefore, can act independently since its powers are derived from the governing statute. It is the content/text of the statute that would determine its power, function, scope, mandate, status and any limitations or restrictions in relation thereto. Such a body cannot be extinguished or merged into any other organization except by way of legislation. A statutory body, unlike an Attached Department, is an arm of the Government which can acts distinctly and independently of the Department concerned and its procedures. A statutory body can make policies and effectively procure their

approvals from the relevant forums (Government or Parliament). A statutory body can be placed at par with other similar organizations at Provincial and Federal level vis-à-vis implementation of the policies. A statutory body is also effective in terms of proposing incentives for investors and get those incentives implemented at Provincial and Federal level. A distinctive advantage of a statutory body is that it would absorb the existing statutory bodies or their overlapping functions, as applicable, since existing statutory bodies or their functions can be taken away on by way of legislation.

For the purpose of performance of its functions, the governing law may provide that the body may seek assistance of other agencies including governmental and/or private sector organizations [and to make such assistance obligatory].

The disadvantages of a statutory body are that it remains under the audit control of the Auditor General of Pakistan. However, within its legal framework the scope of the audit can be defined and restricted.

Also, a statutory body is to absorb the employees of organizations, which it seeks to merge in itself and guarantee protection of their employment. Another feature of a statutory body, which in some cases acts to the disadvantage, is that it is always under judicial scrutiny/review under the extraordinary Constitutional Jurisdiction (commonly known as Writ Jurisdiction) of a High Court¹²⁶. However, it is relevant to point out that primarily the function to be discharged by KPBOIT is in the nature of facilitation or advisory role and any adjudicatory or enforcement role generally linked with regulatory body is not envisaged. Thus, the exposure to potential litigation may be limited. On the other hand, it can be viewed that having a right to sue or to be sued in its own name may provide a more direct opportunity for due representation.

Pak BOI is a statutory body set up under the Ordinance. The Ordinance prescribes for the establishment, composition, appointment and terms of the Pak BOI¹²⁷. The Ordinance provides for the meetings of the board¹²⁸. The law prescribes in detail the functions to be performed by the board. Such functions being prescribed by the Ordinance, cannot be amended or withdrawn by the Federal Government. The Ordinance, in detail, provides for accounts and budget of the board¹²⁹. The board has been empowered to make recruitments and prescribe terms and conditions of employment¹³⁰. It has the power to make rules (with prior consent of the Federal Government) and regulations for the purposes of its functions under the Ordinance¹³¹.

For the purpose of performance of its functions, the board may require assistance of other agency including private sector organizations and agencies, any Ministry, Division, Department, statutory body, corporation, agency of the Federal Government or a Provincial Government which, in board's opinion, concerns any matter relating to the Pak BOI, and such agency(s) are under legal obligation to provide Pak BOI the requested information within a fortnight of the receipt of such request. In addition, the Pak BOI can require any of the

¹²⁶ Article 199 of the Constitution

¹²⁷ Section 3 of the Ordinance

¹²⁸ Section 7 of the Ordinance

¹²⁹ Chapter-III of the Ordinance

¹³⁰ Section 17 of the Ordinance

¹³¹ Sections 23 & 24 of the Ordinance

agencies to review their existing policies or decisions in respect of investment, and such agencies are under legal obligations to review their respective decisions or policies and incase Pak BOI is not satisfied, it can take the matter before the special committee of the Federal Cabinet on Investment¹³². This power provides a unique character to Pak BOI which enables it to enforce its functions across the board.

7.4 KPBOIT as a company

7.4.1 Procedural Requirements for Incorporation

It is norm for the Governments that they set up companies in order to further their policies. For the functions like those of KPBOIT, a corporate entity may be set up under Section 42 of the Companies Ordinance, 1984 (“**CO, 1984**”). Section 42(1) of the CO, 1984 provides that “*an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, religion, sports, social services, charity or any other useful object, and applies or intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members*” may be formed as a not for profit company.

In order to form a not for profit company, as a first step, KPBOIT would require to apply to the Company Registration Office (“**CRO**”) of the Securities and Exchange Commission of Pakistan (“**SECP**”) for availability of name of the proposed company followed by application for grant of licence for setting up of a not for profit company. A licence may be granted initially for five years subject to certain condition imposed by the SECP¹³³. Upon grant of the licence, KPBOIT may file incorporation documents (such as Memorandum of Association and Articles of Association of the proposed company along with certain authorizations by the Provincial Government in respect of setting up of a not for profit company) and deposit receipts of requisite registration fees. Upon scrutiny by the CRO, a certificate of incorporation is issued and company starts functioning as a not for profit company.

The Memorandum of Association of company provides for the name and objectives of the formation of company. It is important to note that the company cannot function beyond the scope determined by its Memorandum of Association. The day to day functions of the company are carried out pursuant to its Articles of Association. The company form policies in respect of functions of its board, terms and conditions of employment, and other matters (to implement the objectives of the company as prescribed by its Memorandum).

The Provincial Government would be the sole owner of the company. It may appoint directors on the board of the company. The Provincial Government may give representation to the private sector on the board as well the Chief Executive Officer may also be appointed from the private sector.

7.4.2 Level of Operational and Financial Autonomy

The Government, being shareholder/member of a corporate entity has direct influence over the management of affairs of the company. Even though the

¹³² Section 17 of the Ordinance

¹³³ Section 42(1) and (2) of CO, 1984

board members are from the private sectors, however, the Provincial Government may remove such directors any time.

A not for profit company has financial autonomy. It can generate funds for itself and also may appoint external auditor¹³⁴ who audits the accounts of the company¹³⁵. However, it is considered that since the companies fully owned by the Provincial Government have nexus to the Government, therefore, they are subject to audit by the Auditor General.

A company has power to frame regulations for employment. The business of the company is carried out pursuant to the Articles of Association. The structure provides the company operational and financial autonomy.

7.4.3 Financial Responsibilities

A company has certain responsibilities towards its regulator i.e. SECP (or CRO) in terms of filings. A company is required to maintain books of account¹³⁶ and is obliged to make these books available for inspection by the directors anytime in business hours. A default by the company in respect of its obligations in maintaining books of accounts etc. is subject to penalty under CO, 1984. Moreover, the accounts of the company are subject to audit by an independent chartered accountant firm and are to be presented in the Annual General Meeting for approval by the members (that is, the Provincial Government).

7.4.4 Advantages/Disadvantages

The advantages of a not for profit company are that it is a corporate entity and acts as an independent legal person. It is autonomous in respect of its functions and financials. The Government control and scrutiny is limited in case of a not for profit company. The company acts through its board of directors who may exercise their powers as given in the Memorandum of Association and Articles of Association of the company. The Provincial Government, may however, influence the company through its nominees on the board.

Disadvantages of setting up of a not for profit company, in case of KPBOIT, are that it would not have an equal force as a Provincial Government Department in respect of implementing policies, particularly in the matters where other Government institutions such as SDA, SIDB, Home Department, or institutions of Federal Government (such as Pak BOI, Interior Ministry, Federal Board of Revenue, State Bank of Pakistan or SECP) are involved, because such Departments and/or institutions have superior role due to their administrative and legal hierarchy, and KPBOIT, as a company would not be able to force them to implement a suggestion or request. Furthermore, it would not be easy for KPBOIT as a company to incorporate or implement any incentive to attract the investors and investment at the Provincial Government level.

Punjab BOIT has been set up as a not for profit company. Although, it is directly under the Chief Minister of the Province of Punjab, however, it does not have legal force to implement the investment policy objectives. From the projects carried out by it, it may be seen that Punjab BOIT has been able to provide only provide consultancy services and conducted a few seminars and conference

¹³⁴ Section 252 of CO, 1984

¹³⁵ Section 233 of CO, 1984

¹³⁶ Section 230 of CO, 1984

from its incorporation. As from the available information, no evidence is found that it has been able to propose or implement any investment incentive or tangible facilitation in terms of bringing investment in the Province of Punjab¹³⁷.

¹³⁷ Please refer to Section 5.2 above and also <http://www.pbit.gop.pk/eng/achievements>

8. KPBOIT Legal Structure

8.1 Current Status

For current status of the KPBOIT please refer to Section 3.3 of this Concept Paper, titled “Existing Legal Status” wherein detailed discussion has been provided regarding the salient features of KPBOIT which is the creation of an executive notification. The said section contains in-depth analysis of the current legal structure of the KPBOIT in view of the information provided in the relevant notifications and Minutes of Board Meetings and the perceived vision.

8.2 Addressing Key Concerns for KPBOIT as a Statutory Body

8.2.1 Autonomy

KPBOIT, as per Notification dated 10 September 2012, is envisaged to have operational and financial autonomy. Based on our meetings, it is our understanding that KPBOIT is not expected typically to function as a government department, yet its role is such that it has to liaison with ministries and government departments very closely for facilitating investors in seeking licences/permits/approvals. The scope of autonomy needs to be addressed in the legal framework, which should fundamentally make it an administratively autonomous body giving it full authority in the hiring and firing of human resource and for the purposes of generation and use of funds for the running of its affairs.

Also, it needs to be recognized that KPBOIT cannot function in isolation, i.e. merely as a provincial body. While facilitating investments in KP Province, KPBOIT will have interface with Pak BOI in respect of foreign exchange, imports, registration of foreign experts/technicians/engineers/consultants etc., setting up of branch offices of foreign companies, licences, income tax and any other matter, which falls within the domain of Federal Government; therefore, such interface would require a sound legal footing at provincial level.

The statute apart from providing administrative autonomy can render legal autonomy which gives it an independent status, right to sue and be sued, right to borrow and enter into contracts in its own name; right to acquire, hold and enjoy movable and immovable property.

It can also confer structural independence making Chief Executive Officer responsible for day to day running of the affairs and an advisory role to the board members. The diversification aspect of the board is important considering the main objective i.e. to act as a facilitating agency. It can cater for structuring such body into departments, divisions with relevant heads. Also, the appointment of board and the Chief Executive Officer and the terms of the Chief Executive Officer or other executive members of the board can be provided for in the statute. The process of removal giving a fixed term/tenure will also strengthen independence aspect.

8.2.2 Funding

All board of investments get government grants and have provision to accept donations in addition to utilizing the revenue earned through fee and charges. It would be helpful to know the percentage of revenue generated through fee and

charge by the other boards of investment, however, in our view this is not to constitute a material source when the focus is essentially on reducing cost of business. It needs to be borne in mind that administrative autonomy would be impossible without having financial autonomy. While grants from the government should be retained, independent and continuous source of funding must be cater for and in this regard the popular way is to have seed money forming perpetual part of the fund and income generated from its investment.

The statute can provide for a provision of funding from sources other than the Provincial Government.

8.2.3 Fiduciary Responsibility

The relevant notifications for creation of KPBOIT as discussed in Section 3.3 highlight that no mechanism has been envisaged regarding entrusting the board with any power vis-à-vis its functioning or conduct of business. The board has no financial powers and the notifications are vague regarding the day-to-day operations and expenditure. In the absence of financial powers, there cannot be any delegation of such powers. As pointed out earlier, the Executive/HR Committee has been set up by the Industries, Commerce and Technical Education Department with defined TORs whereas, the Finance and Audit Committee, have been set up by the Board of KPBOIT when no express power has been given to the board in this regard –when no express powers have been to board in this regard. Accordingly, statute can provide a clearer and a stronger legal framework addressing all such aspects and providing the power to delegate such powers as deemed appropriate.

8.2.4 Audit

It is understood that for the purposes of transparency and accountability, the preferred option for KPBOIT is through private audit firms rather than subjecting it to the oversight of Auditor General that may not have appreciation of the dimensions of financial and operational independence of such a body.

This concern can be addressed in a statute by way of introducing provision relating to the audit. However, it is important to note that in case a statutory body draws its funding from Provincial accounts, it would be subject to the audit by the Auditor General. However, even if owing to its funding or grants where it falls within the purview of Auditor General such audit can be restricted to the audit of balance sheet and account for exhibiting the correct view of the affairs of the body.

8.2.5 Overlapping functions by existing bodies

At the time of inception of KPBOIT, there existed other investment facilitation bodies, such as SDA and SIDB and other investment facilitation committees. Such bodies are set up through executive notifications or through provincial laws. Such bodies have mandate to facilitate investment and KPBOIT has to be the focal body with overriding powers to undertake the proposed functions of a board of investment.

The proposed law would address this concern by providing an overriding and/or amending and/or repealing provision whereby the existing investment facilitation bodies would be dissolved or their functions would be carved out to facilitate KPBOIT as a lead agency or that such functions remain solely with the KPBOIT.

8.2.6 Composition of Board, Hiring of Staff/ Transfer and Absorption of employees

From our review of regional and global laws in relation to investment promotion agencies it was noted that the composition and criteria for the board is prescribed by the law itself. Law has to be strictly followed and such provision of composition of board and eligibility of members reduces scope of political interference in respect of composition and appointment of members to the board.

It is understood that a substantial number of employees have been employed in existing investment facilitation bodies. Therefore, KPBOIT legal framework must address as to how such employees may be absorbed/transferred or relieved. Also, the status of the employees of the KPBOIT and the indemnities available in discharge of their functions are relevant.

The concern regarding hiring of staff can be addressed in a statute by way of making it administratively independent empowering fully KPBOIT vis-à-vis hiring of staff, experts and consultants and conferring power to make regulations. This enables a statutory body KPBOIT to employ professional staff without interference by the government or other departments. Also, the law can provide for absorption of the existing employees as required for the purposes of KPBOIT within the discretion of KPBOIT and those who are not considered required may either continue with their parent departments or can be declared surplus until absorbed by any other department. In the event, they are declared surplus, KPBOIT may have to continue paying their current salaries until their due absorption by any other department.

8.2.7 Framing of Rules and Regulations

Currently, KPBOIT does not have any rules or regulations and being a notified entity, most of the aspects in terms of their scope of activities as well as discharge of their functions and duties remain unaddressed. Access to any rules or regulations relevant to any of the Provincial or the Federal Board of Investment was not available.

The three most fundamental rules/regulations required to be in place are; (i) Rules for the Conduct Business of KPBOIT; (ii) the Service Regulations; and (iii) the Audit Regulations. The first will address the functioning and decision-making process, the second will address the terms of employment for service with KPBOIT, and the third will ensure transparency and accountability in the day to day running of affairs.

It is important to understand the distinction between the rules and regulations. In this regard, it is considered essential that KPBOIT should be entrusted with the power to make regulations (which do not require approval of the government) for the day to day running of affairs and performance of its functions. Rules invariably require approval of the Provincial Government through the concerned Department and such rules generally pertain to the appointment of members, their terms of emoluments, or such matters where a higher forum approval is deemed necessary owing to any conflict aspects that may arise.

8.2.8 Validation of current KPBOIT

It is understood that it is one of the major concerns that upon implementation of the new legal framework, the legality and status of existing status of KPBOIT and any decisions taken under the existing notifications should remain valid and the process is more step forward rather than undoing the previous initiatives.

In this regard an express provision can address the concern by providing an umbrella protection to anything done, actions taken, notifications issued, agreements made, project initiated, processes and communication issued, powers conferred, assumed or exercised by KPBOIT or its officers before the commencement of the proposed statute, to be deemed to have been validly done.

In light of the above discussion, broadly speaking, the proposed structure would mainly provide for the following:

- (xi) Legal status
- (xii) Composition of Board
- (xiii) Functions and powers
- (xiv) Funding
- (xv) Delegation of powers
- (xvi) Absorption of investment promotion role from all existing entities
- (xvii) Rulemaking and Regulation making powers
- (xviii) Recruitment and status of employees and legal protection
- (xix) Power to seek assistance from other agencies and signing of MOUs, agreements
- (xx) Validation of acts

9. Conclusion Re: Proposed Structure

In light of the above, for a body like KPBOIT it is best to have the legal structure under authority of a statute.

9.1 Reasons and Key Considerations for Proposed Option

Unlike non-statutory government bodies (be it a Department or an Attached Department), a statutory body is more independent financially as well operationally. It can generate revenues from the sources defined by the law. The law provides for the revenue sources and maintenance of accounts. The other important feature is that, unlike a Department, such a body would not be lacking in the ability to implement investment policies and measures. Our recommendation finds support from the review of structure of Pak BOI as well as the regional and global models. It was noted that a statutory instrument of enactment empowers such bodies with a strength to implement investment policies and measures and other government agencies can be effectively obligated to implement/follow such policies and measures. A legal entity by notification will not be able to address most of the key concerns stated above, nor would it give permanence to its status; this would in effect weaken KPBOIT's stature particularly in view of the fact that there are other statutory bodies which stand higher in the hierarchy of legislative instruments. KPBOIT, in order for its interface with the other organizations such as SDA and SIDB in the Province and Pak BOI, State Bank of Pakistan, Ministry of Interior etc. in the Federal Government, would require more sound legal footings.

As for incorporating a not for company, it will become an entity regulated by the SECP, which is a Federal agency. The incorporation and filing requirements are formal and would require strict adherence, which given the scope of activities to be performed by KPBOIT is not required. In addition, The objectives of KPBOIT provided in Notification dated 10 September 2012, i.e. facilitating investment and acting as one window entity, which requires capability to implement facilitation, would not be achieved in a structure of a not for profit company. Whereas, as mentioned above, a statutory body can cater for all weaknesses present in other options.

For proposing KPBOIT to be a statutory body, our key considerations are as follows:

- (i) KPBOIT should have a permanent legal existence and organizational structure along with protection to the actions taken by employees pursuant to the law, rules, regulations governing KPBOIT thus providing for a defined legal framework;
- (ii) KPBOIT should have ability to develop and propose investment policies for the approval by the Provincial Government and its functions and objectives should be clearly enunciated in an enactment that is the highest form of legislative instrument;
- (iii) The Chief Executive (that is, the Chief Minister) of the Province should have active position (not on administrative level, but on policy level) in the mainstream of KPBOIT, so that any action taken by KPBOIT is considered to have full support of the Provincial Government but should not be subject to any interference by the Provincial Government. The administrative head

- of KPBOIT (chairperson) should be appointed by the Chief Executive of the Province and shall have the status of Provincial Minister;
- (iv) It should have sound legal footing to control and implement investments in the Province and all other Provincial Government agencies, it should have the right to seek assistance and other bodies have to be legally obligated to support such measures that lie within purview of KPBOIT;
 - (v) KPBOIT should have power to initiate and implement projects by itself or by way of public private partnership, in this regard, legal and structural independence will play an important role;
 - (vi) KPBOIT should be capable of announcing incentives for the investors and should play a role in formulating and developing policies that open avenues for investment.

It follows from the above that a body set up under the statute has permanence and stability. One of the characteristics of a body set up under the authority of a statute is that is a separate legal person and has perpetual succession. Any change in its legal structure would be possible only by way of an amendment to its law. This automatically imparts stability to a body. Moreover, being a separate legal person, it can enter into agreements, carry out investment projects, and raise funding, issue securities for loan etc. in its own name without obtaining approvals from the government. Its permanent and separate legal status would be more effective in attracting investment, especially, when the Provincial Government empowers it to guarantee certain securities for investment, if any. A statutory body has more operational autonomy than other forms of organization by virtue of its own law, rules and regulations. Approvals from the government are not required for each and every operational function. It was noted that some of the functions of SDA and SIDB overlap with those of KPBOIT.

In order to ensure that KPBOIT is entrusted with a lead role, statute would be the best legal instrument to lend permanence and to define its role. A statutory body, under its parent law, can be empowered to make its own byelaws, i.e. the rules and regulations. The subordinate legislative powers are granted to a statutory body in order to enable to perform its functions and to fill in the aspects that may arise from time to time but are not expressly catered in the parent enactment. This provides a lot of flexibility both in terms of policy making and in carrying out the actions. As a statutory body, KPBOIT in its interface with the Federal Government entities or Provincial bodies would always remain at par in status with such bodies and will not be undermined by virtue of its legal status.

10. Notice to the Reader

This report contains only suggestions and recommendations as to an efficient legal structure for Khyber Pakhtunkhwa Board of Investment and Trade (KPBOIT) and decisions regarding the implementation of the legal structure for KPBOIT shall rest with the top management of KPBOIT and the provincial government of KP Province.

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